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# **THE PENNSYLVANIA CORPORATION REPORTER**

Containing

**OPINIONS, GENERAL ORDERS, ADMINISTRATIVE RULINGS, REPORTS,  
CIRCULARS, RULES OF PRACTICE, ETC., OF**

**THE PUBLIC SERVICE COMMISSION  
OF PENNSYLVANIA**

And

**OPINIONS OF THE COUNTY COURTS THROUGHOUT THE COMMON-  
WEALTH AND OF THE ATTORNEY GENERAL INVOLVING THE LAW  
OF PRIVATE CORPORATIONS, INCLUDING CORPORATION  
TAX CASES AND APPEALS FROM THE  
PUBLIC SERVICE COMMISSION**

Also

**INDEX AND ANNOTATIONS TO THE PUBLIC  
SERVICE COMPANY LAW**

With

**TABLES OF CITATIONS OF VARIOUS SECTIONS OF THE LAW AND  
OF THE OPINIONS OF THE COMMISSION**

Reported and Edited by  
**GEO. ROSS HULL**  
Of the Dauphin County Bar

Volume II

*JULY 1914—JULY 1915*

**THE PENNSYLVANIA CORPORATION REPORTER  
HARRISBURG, PA.**



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by  
GEO. ROSS HULL**

**OCT 20 1915**

## TABLE OF CONTENTS

### Table of Cases—

Public Service Commission .....	iv
Attorney General .....	viii
County Court Opinions .....	ix
Table of Cases Appealed .....	xii
Opinions .....	1-763
Appendix .....	i-clix



## TABLE OF CASES

### PUBLIC SERVICE COMMISSION

#### ADMINISTRATIVE RULINGS.

Nos. 1 and 2 .....	(See Vol. I)	
No. 3, In re Free Transportation of Railroad Contractors .....		99
No. 4, In re Free Transportation for Charitable Organizations .....		100
No. 5, (Superseding Conference Ruling No. 1) In re requiring published rates and fares to continue in effect for thirty days .....		287
No. 6, In re discounts and penalties .....		386
No. 7, In re sale of commutation and term tickets .....		650

#### GENERAL ORDERS.

Nos. 1 to 10 .....	(See Vol. I)	
No. 11, (Superseding General Order No. 2) In re Crossings of Facilities .....		102
No. 12, In re publication of Commission's Rulings by public service companies .....		339

#### CONFERENCE RULINGS

No. 1. In re requiring published rates and fares to continue in effect for thirty days. (Superseded by Administrative Ruling No. 5), .....	100
No. 2. In re application of rates at intermediate points, .....	101

#### TARIFF CIRCULARS

No. 1. Regulations Governing the Granting of Power of Attorney and the Issuing of Concurrence in Tariffs, ....	91
No. 2. In re rates and fares on newly constructed lines, .....	98

#### RULES OF PRACTICE AND PROCEDURE, .....I to 31

# TABLE OF CASES.

v

## OPINIONS.

Adrian Furnace Co. v. P. R. R. Co. ....	632
American Reduction Co. v. B. & O. R. R. Co. ....	672
Application of East Penn Gas Light Co. et al. ....	688
Application of Gaffney & James City R. R. Co. ....	112
Application of Harmony Electric Co., Protest of Penna. Power Co. ....	42
Application of Peoples Natural Gas Co., and Borough of Juniata	620
Application of Potato Creek Gas Co. ....	491
Application of Raystown Water Power Co. ....	483
Application of Reading, Birdsboro & Pottstown R. R. Co. ....	536
Application of Supervisors of Concord Twp. ....	590
Application of Wilkes-Barre Connecting R. R. Co. ....	470
Baldrige v. McKeesport & Duquesne Bridge Co. ....	79
B. & O. R. R. Co., American Reduction Co. v. ....	672
B. & O. R. R. Co., Blough v. ....	84
Bangor Electric Light, Heat & Power Co. et al., Grub et al., v.	175
Bell Tel. Co., Lehigh Valley Coal Co. v. ....	441
Bell Tel. Co., Norwich Tel. Co. v. ....	466
Biglerville Water Co., Town Council of Biglerville v. ....	729
Big Spring Elec. Co., Elliott et al. v. ....	709
Birdsboro Stone Co. v. P. & R. Ry. Co. ....	264
Bixler et al. v. United Elec. Co. of Lemoyne ....	609
Blough v. B. & O. R. R. Co. ....	84
Blue Mt. Tel. & Tel. Co., Slate Belt Tel. & Tel. Co. v. ....	403
Bondholders of Allegheny Valley Water Co. v. Borough of Tarentum ....	518
Borough of Avoca's Petition ....	372
Borough of Butler's Petition ....	65, 178
Borough of Exeter's Petition ....	52, 60, 539
Borough of Gallizin's Petition ....	369
Borough of Gettysburg's Petition ....	331
Borough of Lewistown v. Penn Central Light & Power Co. ....	249
Borough of Mt. Union v. Mt. Union Water Co. ....	698
Borough of Schuylkill Haven v. Schuylkill Haven Gas & Water Co. ....	617
Borough of Tarentum, Bondholders of Allegheny Valley Water Co. v. ....	518
Brandt v. Leas and The East Berlin R. R. Co. ....	419
Business Men's Assn. of Hatboro v. P. & R. Ry. Co. ....	524
Callahan et al v. Erie R. R. Co. ....	257
Cambria Inclined Plane Co., Geer v. ....	455
Cauffiel et al v. Citizens Light, Heat & Power Co. ....	189
Chambersburg, Greencastle & Waynesboro St. Ry. Co., Staun- fer v. ....	89

## TABLE OF CASES.

Citizens' Elec. Ill. Co. v. Consumers' Elec. Co. ....	384
Citizens Light, Heat & Power Co., Cauffiel et al. v. ....	189
City of Phila., etc. et al. v. P. & R. Ry. Co. et al. ....	313
City of Pittston's Petition .....	105
City of Scranton v. Scranton Rys. Co. ....	689
City of Wilkes-Barre v. Lehigh Valley R. R. Co. et al. ....	278
City of York, York Water Co. v. ....	185
Combined Committee, etc. et al. v. P. R. R. Co. et al. ....	262, 390, 717
Consumers' Elec. Co., Citizens' Elec. Ill. Co. v. ....	384
Crucible Steel Co. of A. v. P. R. R. Co. ....	599
Curry et al. v. Emlenton Water Co. ....	613
Dallas et al. v. P. R. R. Co. ....	180
Davis et al. v. Northern Central Ry. Co. ....	605
D. L. & W. R. R. Co., Jones et al. v. ....	461
Dexter Portland Cement Co. et al v. Lehigh Valley R. R. Co. et al. ....	447
Eastern Penna. Rys. Co., State Hospital of Coaldale v. ....	673
Elliott et al. v. Big Spring Elec. Co. ....	709
Emlenton Water Co., Curry et al. v. ....	613
Enck v. Reading and Columbia R. R. Co., and P. & R. Ry. Co. ....	528
Erie Co. Elec. Co., James Thompson and M. A. Hanna Co. v. ....	199
Erie R. R. Co., Callahan et al. v. ....	257
Erie R. R. Co., Hurst et al. v. ....	453
Ernst et al. v. Glenside Water Co. ....	119
Fiscus v. P. & R. Ry. Co. ....	252
Geer v. Cambria Inclined Plane Co. ....	455
Glenside Water Co., Ernst et al. v. ....	119
Good Shepherd Home v. Lehigh Valley Light & Power Co. ....	187
Grubb et al. v. Bangor Elec. Light, Heat & Power Co. et al. ..	175
Guy v. New York Central R. R. Co. ....	529
Hurst et al. v. Erie R. R. Co. ....	453
In re Abolition of Grade Crossing, etc. ....	730
In re Allowance of Discount after Expiration of Discount Pe- riod .....	127
In re Application, etc. (Phila. Commuters' Case) .....	728
In re Approval of Erection of Municipal Water Plant .....	104
In re Free Transportation of Municipal Officers .....	126
In re Grade Crossings in Concord Twp. ....	593
In re Grade Crossings over Cochection and Great Bend Turn- pike, etc. ....	586
In re Orders for Reparation .....	104
In re Use of Streets of Municipality by Street Railway .....	127
James Thompson and M. A. Hanna Co. v. Erie Co. Elec. Co. ..	199
Jones et al. v. D. L. & W. R. R. Co. ....	461
Keefer v. P. R. R. Co. ....	452, 539

## TABLE OF CASES.

vii

Lare v. Penna. Water Co. ....	733
Leas and The East Berlin R. R. Co., Brandt v. ....	419
Lehigh Fire Brick Works et al. v. Penna. R. R. Co. et al. ....	625
Lehigh Nav. Elec. Co., Penna. Utilities Co. v. ....	74
Lehigh Valley Coal Co. v. Bell Tel. Co. ....	441
Lehigh Valley Light & Power Co., The Good Shepherd Home v. ....	187
Lehigh Valley R. R. Co. et al., City of Wilkes-Barre v. ....	278
Lehigh Valley R. R. Co. et al., Dexter, Portland Cement Co. et al. v. ....	447
Lehigh Valley Transit Co., Sassaman v. ....	80
Mansfield S. N. S. v. Mansfield Water Co. ....	522
Mansfield Water Co., Mansfield S. N. S. v. ....	522
McKeesport & Duquesne Bridge Co., Baldrige v. ....	79
Mehard et al. v. New Wilmington Water Supply Co. ....	272
Meter v. Metropolitan Elec. Co. ....	117
Metropolitan Elec. Co., Meter v. ....	117
Miners, etc. v. P. & R. Ry. Co. ....	126
Mt. Union Water Co., Borough of Mt. Union v. ....	698
New Wilmington Water Supply Co., Mehard et al. v. ....	272
New York Central Merger ....	377
New York Central R. R. Co., Guy v. ....	529
Northern Central Ry. Co., Davis et al. v. ....	605
Norwich Tel. Co. v. Bell Tel. Co. ....	466
Perkiomen Elec. Transit Co.'s Petition ....	334
Petition of the City of Williamsport ....	639
Petition of Cornwall & Lebanon R. R. Co. ....	388
Petitions of East End Elec. Light, Heat & Power Co., and Relief Elec. Light, Heat & Power Co. ....	714
Petition of Lake Shore & Michigan Southern Ry. Co. et al. ....	377
Petition of Lehigh Nav. Elec. Co. ....	413
Petition of Phoenixville, Valley Forge & Strafford Elec. Ry. Co. Petition of the Twp. of Jenkins ....	191
Penn Central Light & Power Co., Borough of Lewistown v. ..	680
Penna. Co., Rhoades v. ....	249
Penna. Paraffine Works et al. v. Penna. R. R. Co. and Penna. Co. ....	732
Penna. R. R. Co., Adrian Furnace Co. v. ....	513
Penna. R. R. Co. et al., Combined Committee, etc. et al. v. 262, 390, 717	632
Penna. R. R. Co., Crucible Steel Co. of A. v. ....	599
Penna. R. R. Co., Dallas et al. v. ....	180
Penna. R. R. Co., Keefer v. ....	452, 539
Penna. R. R. Co. et al., Lehigh Fire Brick Works et al. v. ....	625
Penna. R. R. Co. and Penna. Co., Penna. Paraffine Works et al. v. ....	513
Penna. R. R. Co., Penna. Rubber Co. et al. v. ....	31
Penna. R. R. Co., Pittsburgh Plate Glass Co. v. ....	530, 695

## TABLE OF CASES.

Penna. R. R. Co. et al., West Va. Pulp & Paper Co. et al. v. ....	673
Penna. Rubber Co., et al. v. Penna. R. R. Co. ....	31
Penna. Utilities Co. v. Lehigh Nav. Elec. Co. ....	74
Penna. Water Co., Lare v. ....	733
P. & R. Ry. Co., Birdsboro Stone Co. v. ....	264
P. & R. Ry. Co., Business Men's Assn. of Hatboro v. ....	524
P. & R. Ry. Co. et al., City of Phila, etc. et al. v. ....	313
P. & R. Ry. Co., Fiscus v. ....	252
P. & R. Ry. Co., Miners, etc. v. ....	126
Pittsburgh and Lake Erie R. R. Co. et al., Pittsburgh Steel Co. v. ....	86
Pittsburgh Plate Glass Co. v. Penna. R. R. Co. ....	530, 695
Pittsburgh Rys. Co., Twenty-Seventh Ward Progressive Club v. ....	585
Pittsburgh Steel Co. v. Pittsburgh & Lake Erie R. R. Co. et al. ....	86
Protest of Penna. Power Co. to Application of Harmony Elec. Co. ....	42
Protest of Pottstown & Phoenixville Ry. Co. ....	191
Reading & Columbia R. R. Co. and P. & R. Ry. Co., Enck v. ...	528
Rhoades v. Penna. Co. ....	732
Sassaman v. Lehigh Valley Transit Co. ....	80
Schuylkill Haven Gas & Water Co., Borough of Schuylkill Haven v. ....	617
Scranton Rys. Co., City of Scranton v. ....	689
Slate Belt Tel. & Tel. Co. v. Blue Mt. Tel. & Tel. Co. ....	403
State Hospital of Coaldale v. Eastern Penna. Rys. Co. ....	673
Stouffer v. Chambersburg, Greencastle & Waynesboro St. Ry. Co. ....	89
Town Council of Biglerville Borough v. Biglerville Water Co. ....	729
Twenty-Seventh Ward Progressive Club v. Pittsburgh Rys. Co. ....	585
West Kishacoquillas Turnpike Road Co., Zook v. ....	194
West Va. Pulp & Paper Co. et al. v. Penna. R. R. Co. et al. ...	673
United Elec. Co. of Lemoyne, Bixler et al. v. ....	609
York Water Co. v. City of York ....	185
Zook v. West Kishacoquillas Turnpike Road Co. ....	194
<b>ATTORNEY GENERAL.</b>	
In re Application of York Railways Co. ....	540
In re Co-operative Banking Associations ....	340
In re Incorporation of Water Company ....	182



# TABLE OF CASES.

ix

## COUNTY COURT OPINIONS.

Alden Coal Co., Com. v. (Dauphin Co.) .....	696
American Lime & Stone Co., Com. v. (Dauphin Co.) .....	903
American Union Fire Ins. Co., Havilak v. (Luzerne Co.) ....	968
Arasapha Mfg. Co., Wetherill et al. v. (Delaware Co.) .....	579
Bank of Hamilton v. Trescher (Westmoreland Co.) .....	361
Barium Product Co., Jerymn et al. v. (Lackawanna Co.) .....	511
Barnd v. First Nat'l Bank (Schuylkill Co.) .....	222
Belinski et al., Society of St. Michael the Archangel v. (Lackawanna Co.) .....	294
Bellefonte Lime Co., Com. v. (Dauphin Co.) .....	437
Blair, Trustee, Assignee v. The Kingston Mfg. Co. et al. (Luzerne Co.) .....	353, 355
Body, Donaldson, Receiver v. (Berks Co.) .....	162
Boyer, Donaldson, Receiver v. (Berks Co.) .....	165
Broudy, Goodyear Raincoat Co. v. (Allegheny Co.) .....	212
Central R. R. Co. of N. J., Crane R. R. Co. v. (Lehigh Co.) ..	224
Citizens' Elec. Ill. Co. v. Consumers' Elec. Co. of Exeter (Luzerne Co.) .....	426
City of Harrisburg et al., Tracy, Receiver, etc. v. (Dauphin Co.)	367
Com. v. Alden Coal Co. (Dauphin Co.) .....	696
Com. v. American Lime & Stone Co. (Dauphin Co.) .....	903
Com. v. Bellefonte Lime Co. (Dauphin Co.) .....	437
Com. ex rel. Atty. Gen. v. Guardian Fire Ins. Co. (Dauphin Co.)	365
Com. v. Imperial Window Glass Co. (Dauphin Co.) .....	493
Com. v. The Independent Refining Co. (Dauphin Co.) .....	168
Com. v. Industrial Cold Storage & Warehouse Co. (Dauphin Co.) .....	429
Com. v. John B. Stetson Co. (Dauphin Co.) .....	240
Com. v. John T. Dyer Quarry Co. (Dauphin Co.) .....	432
Com. v. Metropolitan Life Ins. Co. (Dauphin Co.) .....	734
Com. v. Penn Mutual Life Ins. Co. (Dauphin Co.) .....	559
Com. v. Pittsburgh Fire Ins. Co. (Dauphin Co.) .....	171
Com. v. Pottsville Water Co. (Dauphin Co.) .....	500
Com. v. Standard Underground Cable Co. (Dauphin Co.) ....	243
Com. v. St. Clair Coal Co. (Dauphin Co.) .....	654
Com. v. Tonopah & Goldfield R. R. Co. (Dauphin Co.) .....	128
Com. v. Torrance Land Co. (Dauphin Co.) .....	141
Com. v. Westinghouse Airbrake Co. (Dauphin Co.) .....	548
Com. v. West Penn Steel Co. (Dauphin Co.) .....	557
Com. v. Wilkes-Barre & Hazleton R. R. Co. (Dauphin Co.) ...	543
Com. v. Williamsport Rail Co. (Dauphin Co.) .....	497
Consumers' Elec. Co. of Exeter, Citizens' Elec. Ill. Co. v. (Luzerne Co.) .....	426

## TABLE OF CASES.

Consumers' Elec. Co. of Pittston, Appt. v. Public Service Commission et al. (Dauphin Co.) .....	288
Crane R. R. Co. v. Central R. R. Co. of N. J. (Lehigh Co.) .....	224
Cumberland Valley R. R. Co., Joseph Milleisen's Sons v. (Dauphin Co.) .....	670
Deppen Brewing Co., National Freight Bureau v. (Berks Co.) .....	218
Donaldson, Receiver, v. Body (Berks Co.) .....	162
Donaldson, Receiver, v. Boyer (Berks Co.) .....	165
Donaldson, Receiver, v. Mabry (Berks Co.) .....	159
Donaldson, Receiver, v. Rabenhold (Berks Co.) .....	145
Donaldson, Receiver, v. Rollman (Berks Co.) .....	155
First Nat'l Bank, Barnd v. (Schuylkill Co.) .....	222
First Nat'l Bank of Pittsburgh, White v. (Allegheny Co.) ...	748
Goodyear Raincoat Co. v. Broudy (Allegheny Co.) .....	212
Gouglersville Band et al., Heister et al. v. (Berks Co.) .....	298
Guardian Fire Ins. Co., Com. ex rel. Atty. Gen. v. (Dauphin Co.) .....	365
Harrisburg, City of, Tracy, Receiver, etc., v. (Dauphin Co.) ..	367
Havilak v. American Union Fire Ins. Co. (Luzerne Co.) .....	568
Hiester et al. v. Gouglersville Band et al. (Berks Co.) .....	298
Imperial Window Glass Co., Com. v. (Dauphin Co.) .....	493
Independent Ref. Co., Ltd., Com. v. (Dauphin Co.) .....	168
Industrial Cold Storage & Warehouse Co., Com. v. (Dauphin Co.) .....	429
In re Incorporation of Beneficial Society Umberto First (Berks Co.) .....	744
In re Incorporation of Federal Life Assn. (Luzerne Co.) ....	291
In re State Haymakers' Assn. (Phila. No. 5) .....	566
Jefferis et al. v. Pittsburgh Live Stock Exch. (Allegheny Co.)	303
Jerymn et al. v. Barium Product Co. (Lackawanna Co.) .....	511
Joseph Milleisen's Sons v. Cumberland V. R. R. Co. (Dauphin Co.) .....	670
John B. Stetson Co., Com. v. (Dauphin Co.) .....	240
John T. Dyer Quarry Co., Com. v. (Dauphin Co.) .....	432
Kingston Mfg. Co. et al. Blair, Trustee, Assignee, v. (Luzerne Co.) .....	353, 355
Kramer et al, Receivers, v. Look (Dauphin Co.) .....	741
Lamm et al. v. Pension Mutual Life Ins. Co. (Lackawanna Co.)	139
Lehigh Nav. Elec. Co., Penna. Utilities Co. v. (Dauphin Co.) ..	422
Locomobile Co. of America v. Malone (Allegheny Co.) ..439, 570, 651	
Look, Kramer et al. Receivers v. (Dauphin Co.) .....	741
Lutz v. Webster et al. (Phila. No. 5) .....	349
Mabry, Donaldson, Receiver v. (Berks Co.) .....	159
Malone, Locomobile Co. of America v. (Allegheny Co.) 439, 570, 651	
Mamaux v. Union Casualty Ins. Co. (Allegheny Co.) .....	344

# TABLE OF CASES.

xi

McDowell v. North Side Bridge Co. (Allegheny Co.) .....	216
Mellett, Milwaukee Western Malt Co. v. (Schuylkill Co.) .....	357
Metropolitan Life Ins. Co., Com. v. (Dauphin Co.) .....	734
Milwaukee Western Malt Co. v. Mellett (Schuylkill Co.) .....	357
National Freight Bureau v. Deppen Brewing Co. (Berks Co.) ..	218
North Side Bridge Co., McDowell v. (Allegheny Co.) .....	216
O. M. Weber Co., Inc., Tanner, Receiver, v. (Phila. No. 5) ..	167
Panarello v. Paterson, Moran & Luck Co., Inc. (Allegheny Co.)	238
Patterson, Moran & Luck Co., Inc., Panarello v. (Allegheny Co.)	238
Penn Mutual Life Ins. Co., Com. v. (Dauphin Co.) .....	559
Penna. Utilities Co. v. Lehigh Nav. Elec. Co. (Dauphin Co.) ..	422
Pension Mutual Life Ins. Co., Lamm et al. v. (Lackawanna Co.)	139
Pittsburgh Fire Ins. Co., Com. v. (Dauphin Co.) .....	171
Pittsburgh Live Stock Exch., Jefferis v. (Allegheny Co.) ....	303
Potter Title & Trust Co., Schmitt, Receiver, v. (Allegheny Co.)	755
Pottsville Water Co., Com. v. (Dauphin Co.) .....	500
Public Service Commission et al. Consumers' Elec. Co. v. (Dauphin Co.) .....	268
Rabenhold, Donaldson, Receiver, v. (Berks Co.) .....	145
Rollman, Donaldson, Receiver, v. (Berks Co.) .....	155
Schildt v. Valley Railways (Dauphin Co.) .....	740
Schmitt, Receiver, v. Potter Title & Trust Co. (Allegheny Co.)	755
Sickles v. Wyoming Valley Trust Co., etc. (Luzerne Co.) .....	132
Society of St. Michael the Archangel v. Belinski et al. (Lacka- wanna Co.) .....	294
Standard Underground Cable Co., Com. v. (Dauphin Co.) ....	243
St. Clair Coal Co., Com. v. (Dauphin Co.) .....	654
Sunnyside Cemetery Assn's. Charter (Clinton Co.) .....	510
Tanner, Receiver, v. O. M. Weber Co., Inc. (Phila. No. 5) ...	167
Tonopah & Goldfield R. R. Co., Com. v. (Dauphin Co.) .....	128
Torrance Land Co., Com. v. (Dauphin Co.) .....	141
Tracy, Receiver, etc. v. City of Harrisburg (Dauphin Co.) ....	367
Trescher, Bank of Hamilton v. (Westmoreland Co.) .....	361
Union Casualty Ins. Co., Mamaux v. (Allegheny Co.) .....	344
Valley Railways, Schildt v. (Dauphin Co.) .....	740
Webster et al., Lutz v. (Phila. No. 5) .....	349
Westinghouse Airbrake Co., Com. v. (Dauphin Co.) .....	548
West Penn Steel Co., Com. v. (Dauphin Co.) .....	557
Wetherill et al. v. Arasapha Mfg. Co. (Delaware Co.) .....	579
White v. First Nat'l Bank of Pittsburgh (Allegheny Co.) .....	748
Wilkes-Barre & Hazleton R. R. Co., Com. v. (Dauphin Co.) ..	543
Wilkes-Barre & Hazleton R. R. Co., Woelpper v. (Phila. No. 3)	761
Williamsport Rail Co., Com. v. (Dauphin Co.) .....	497
Woelpper v. Wilkes-Barre & Hazleton R. R. Co. (Phila. No. 3)	761
Wyoming Valley Trust Co., etc., Sickles v. (Luzerne Co.) .....	132

**TABLE OF CASES APPEALED**

Cases in Vols. 1 and 2 of The Pennsylvania Corporation Reporter, appeals from which have been published in Pennsylvania Superior Court Reports, to the end of Vol. 58, and in Pennsylvania State Reports, to the end of Vol. 248.

American Steel Foundries v. Hogue, et al., 1 P. C. R. 232. Affirmed 247 Pa. 12.

Bellevue Borough v. Ohio Valley Water Co., 1 P. C. R. 128. Affirmed 245 Pa. 114.

Com. v. Phila. Contributionship etc., 1 P. C. R. 10. Affirmed 242 Pa. 209.

Crane Railroad Co. v. C. R. R. Co. of N. J., 2 P. C. R. 224. Affirmed 248 Pa. 333.

McDowell v. North Side Bridge Co., 2 P. C. R. 216. Reversed 247 Pa. 190.

Miller v. Metropolitan Life Ins. Co., 1 P. C. R. 254. Appeal quashed 58 Pa. Super. 464.

Scott v. Huston et al., 1 P. C. R. 232. Affirmed 247 Pa. 12.

# THE PENNSYLVANIA CORPORATION REPORTER

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## VOLUME TWO

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### PUBLIC SERVICE COMMISSION

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#### RULES OF PRACTICE AND PROCEDURE.

Adopted December 2, 1913.

Revised August 5, 1914.

Adjournment, extension, continuance of hearings. Rule 15, p. 8.

Amendments. Rule 14, p. 8.

Answers. Rule 7, p. 4.

Applications: General requirements. Rule 23, p. 11.

For approval of incorporation. Rule 24, p. 12.

For approval of beginning exercise of any right, power, etc. Rule 24, p. 12.

For certificate of public convenience by municipality. Rule 25, p. 14.

For renewal of franchises, charter, etc. Rule 26, p. 15.

For foreign corporation to do business in Pennsylvania. Rule 27, p. 17.

For assignment, sale, transfer, merger, etc. Rule 28, p. 18.

For purchase, etc., of controlling rights in other company. Rule 29, p. 20.

For special rate on long and short transmission of messages. Rule 30, p. 21.

For restriction of number of tariffs and schedules. Rule 31, p. 22.

For permission to change tariffs and schedules on less than 30 days' notice. Rule 32, p. 22.

For alteration, relocation, or abolition of crossings. Rule 33, p. 23.

For order of reparation. Rule 34, p. 25.

For certificate of valuation. Rule 35, p. 26.

- For approval of contracts between municipalities and public service companies. Rule 36, p. 27.
- All other applications. Rule 37, p. 29.
- Briefs. Rule 20, p. 9.
- Business hours of Commission. Rule 1, p. 3.
- Complaints: form and contents of petition. Rule 5, p. 3.
- Costs of hearings. Rule 8, p. 5.
- Demurrer, notice in the nature of. Rule 10, p. 6.
- Depositions. Rule 19, p. 9.
- Dismissal for failure to prosecute complaint. Rule 17, p. 8.
- "Financial Condition"—the term defined. Rule 22, p. 10.
- Finding, determination or order. Rule 12, p. 7.
- Headings of papers addressed to the Commission. Rule 4, (a), p. 3.
- Hearings upon complaint. Rule 8, p. 5.
- Hearings, practice on. Rule 9, p. 5.
- Information to be supplied by the Secretary. Rule 3, p. 3.
- Investigation by the Commission of its own motion. Rule 11, p. 7.
- Meetings of the Commission. Rule 2, p. 3.
- Number and year given to each proceeding. Rule 4, (b), p. 3.
- Office of Commission. Rule 1, p. 3.
- Orders. Compliance with. Rule 39, p. 30.
- Making, filing and service of. Rule 12, p. 7.
- Modification of. Rule 13, p. 7.
- Service and effect of. Rule 21, p. 10.
- Practice and procedure on petition. Rule 38, p. 30.
- Practice and procedure at hearings. Evidence, burden of proof, etc. Rule 9, p. 5.
- Rehearings. Rule 13, p. 7.
- Satisfaction of complaint or answer thereto. Rule 6, p. 4.
- Sessions of the Commission. Rule 2, p. 3.
- Stipulations. Cases stated. Rule 16, p. 8.
- Subpoenas. Rule 18, p. 9.
- Tariffs and schedules. Rules 31, 32, p. 22.
- To whom all correspondence shall be addressed. Rule 4, (a), p. 3.
- Who may appear before the Commission. Rule 4, (c), p. 3.

**RULE 1. Principal Office.** The principal office of the Commission shall be in the Capitol Building in the City of Harrisburg, and shall be open for business between the hours of 9 A. M. and 5 P. M. every day, legal holidays and Sundays excepted.

**RULE 2. Sessions and Meetings of Commission.** The stated meetings of the Commission will be held in the office of the Commission in the Capitol, in the City of Harrisburg, on the *first* and the *third Tuesday* of every month, holidays excepted.

Sessions and meetings of the Commission may be held at any time and at any place in the Commonwealth, whenever, in the judgment of the Commission the public necessity or convenience may require.

**RULE 3. Information.** The Secretary of the Commission will, upon request, advise as to the form of complaint, petition, answer or other documents necessary to be filed in any proceeding before the Commission, and furnish such other information to the public and to public service companies as may, from time to time, be directed by the Commission.

**RULE 4. Miscellaneous.** (a) All complaints and all petitions and answers in any proceeding or applications in relation thereto, and all letters and telegrams, or other communications, to the Commission, must be addressed "The Public Service Commission of the Commonwealth of Pennsylvania," at Harrisburg, Pennsylvania, unless otherwise specially directed.

(b) The Secretary shall assign to each formal proceeding a year and number, which the parties shall, before filing, place on all subsequent papers in such proceeding.

(c) Any party to a proceeding may appear before the Commission and be heard in person or by attorney.

**RULE 5. Complaints.** No particular form of complaint is required, except that, as provided in the Public Service Company Law, it must be by petition, in writing, duly verified by the affidavit of the complainant, and shall contain a concise statement of all the material facts upon which the complaint is founded.

Said complaint must also set forth the name and post office address of the public service company complained against, the full

name and post office address of the complainant, with the full name and address of the attorney or counsel, if any, of such complainant.

If a violation of any statute, or of a ruling or order of the Commission, is complained of, attention should be called to the section of the statute or the particular ruling or order of the Commission.

At the time of the filing of any complaint, or of any petition, application or other communication, invoking the jurisdiction of the Commission, there shall be filed with the original, three copies thereof.

A copy of the complaint will be forwarded by the Commission to each of the public service companies complained of, by registered mail, accompanied by a notice from the Commission, calling upon the public service company or companies complained of to satisfy the complaint, or to answer the same in writing, within fifteen days, or within such other time, greater or less than fifteen days, as in the judgment of the Commission, the circumstances of the case may require.

All papers filed with the Commission shall be written on one side of the sheet only.

The Secretary of the Commission will furnish blank forms of complaint upon written request.

**RULE 6. Satisfaction of Complaint and Answer.** The public service company or companies complained of shall satisfy the complaint, or make answer thereto, within the time specified in said notice to satisfy or answer as specified in Rule 5. If the complaint is satisfied, both the complainant and the respondent shall notify the Commission thereof promptly, and give the manner or terms of such satisfaction.

In such event the Commission may dismiss the complaint and make a record thereof and no further action need be taken.

**RULE 7. Answers.** The original answer of the public service company or companies complained of must be verified by affidavit and filed with the Commission, and must specifically admit or deny the material allegations of the complaint. If any or all of the allegations of the complaint are denied, the answer must



set forth the facts as they are claimed to be by the party answering.

Three copies of said answer shall be filed with the original, and one copy shall be served by the respondent on the adverse party or parties personally or by registered mail, and due proof of such service shall be filed with the Commission immediately upon the service being made.

**RULE 8. Hearings upon Complaint.** If satisfaction of the complaint be not made, as aforesaid, then after the expiration of the time allowed for answer, and whether the answer has been filed or not, the Commission will determine, from a consideration of the complaint and answer, or otherwise, whether reasonable ground exists for investigating said complaint, and if, in the judgment of the Commission, such reasonable ground exists, then it shall fix a time and place for a hearing and investigate the matter complained of.

Where an answer has been filed and served, as provided in Rule 7, the complainant shall notify the Commission, in writing, whether or not, after considering such answer, the complainant desires a hearing. If said notification is not received by the Commission within five days after the service of the answer upon him, the complaint will be dismissed, unless otherwise directed by the Commission, in any particular case.

Notice of the time and place of such hearing shall be given to the complainant and to the public service company or companies complained against, by registered mail, and the proceedings thereafter will be in accordance with these rules and as the Commission shall from time to time direct.

The cost of, or in connection with, any hearing had upon any complaint, found by the Commission to be without reasonable foundation and made improvidently or from improper motives, will be placed upon the complainant.

**RULE 9. Practice on Hearings.** The complainant must, in all cases, establish the facts alleged to constitute a violation of the law, unless the respondent admits the same, or fails to answer the complaint, except that where the complaint alleges the violation of a lawful determination, ruling or order of the Commis-

sion, the burden of proof shall be upon the public service company complained of to show that such determination, ruling or order has been complied with and the burden of proof shall rest upon the respondent to show that any proposed increased rate is just and reasonable, upon proceedings instituted by complaint, or upon the Commission's own motion, (as provided in Article V, Section 4, of The Public Service Company Law). The respondent must also give evidence of the facts alleged in the answer unless admitted by the complainant, and must fully disclose its defense at the hearing.

Witnesses will be examined orally before the Commission, unless the facts be agreed upon in writing. The testimony will be taken down by the stenographer, and a full and complete record kept of all such proceedings before the Commission or any Commissioner. In case of failure to answer, or to serve notice in nature of demurrer hereafter mentioned, the Commission will take such proof of the facts as may be deemed proper and reasonable, and make such finding, determination and order thereon as the circumstances of the case appear to require.

**RULE 10. Notice in Nature of Demurrer.** Any public service company or companies complained against, deeming the complaint insufficient to show a breach of legal duty, or desiring to set up the absence of power or authority in the Commission to determine such complaint may, instead of answering, serve on the complainant and file with the Commission, its claim of insufficiency, or absence of such power or authority, and for the purpose of disposing of the questions of law thereby raised, the facts stated in the complaint will be deemed to be admitted.

Thereupon the Commission may fix a time and place of hearing of argument on the questions of law involved, and will determine the same, and notify the parties of such decision, and whether the respondent will be required to file an answer, or whether any other action is deemed proper or necessary.

Said notice, in the nature of demurrer, must be filed and served by the respondent within fifteen days of the service of the complaint.

**RULE 11. Investigation by Commission on its Own Motion.** The Commission may, at any time, of its own motion, make investigations and order hearings as to any act or thing done, or omitted to be done, by any public service company which to the Commission seems to be in violation of any provision of law, or of any order or rule of the Commission.

**RULE 12. Finding, Determination or Order.** After hearing by the Commission, a written finding, determination or order shall be made by it, either dismissing the complaint or directing the public service company or companies complained of to satisfy the cause of complaint, in the manner specified by the Commission and authorized by law.

The Commission shall likewise make and file a written finding, determination or order in all hearings or investigations instituted on its own motion.

Such final determination or order shall be filed of record by the Commission and a copy thereof served on the parties entitled thereto, as required by law.

**RULE 13. Re-Hearings and Modification or Rescission of Findings, Determinations or Orders.** Applications for re-hearings shall be by petition, verified by affidavit, which must be filed within fifteen days after the service of the order of the Commission, or within fifteen days after the delivery, by registered mail, of the notice of the finding or determination of the Commission.

Said petitions for re-hearings shall state specifically the grounds upon which the application is based. If the application is to reopen the case for further evidence, the nature and purpose of the evidence and the reason why it was not adduced on the original hearing must be stated, and the same must not be cumulative merely. If the application alleges error in findings of fact or conclusions of law, the alleged error must be particularly stated, with the specific grounds for the allegation of error.

When any finding, determination or order of the Commission is sought to be rescinded, changed or modified, by reason of facts and circumstances arising subsequent to the hearing, or to the order, or by reason of consequences resulting from compliance

with such finding, order or requirement, which are claimed to justify or entitle a rescission, change or modification thereof, the application therefor shall be by petition, which shall fully set forth such facts, circumstances or consequences relied upon, and such petitions shall conform to the requirements hereinafter stated, in Rule 23, as applicable to all petitions filed with the Commission.

Notice of such petition for a re-hearing or for the modification or rescission of any finding, determination or order shall be served by the petitioner on each party to the proceeding before the Commission, by mailing, by registered mail, to said party a copy of said petition and proof of such service shall be filed with the Commission, after which the Commission will fix a time and place of hearing, of which notice will be given by the Commission to each party to the record, by registered mail.

**RULE 14. Amendments.** Amendments to any complaint, petition, answer or other paper filed in any proceeding or investigation may be allowed by the Commission, in its discretion.

**RULE 15. Adjournments and Extensions of Time.** Adjournments and extensions of time may, in the discretion of the Commission, be granted upon the application of any party. Applications for extension of time of hearing shall be accompanied by an affidavit showing a necessity therefor.

**RULE 16. Stipulations.** The parties to any hearing, investigation or other proceeding before the Commission, may, by stipulation, in writing, filed with the Commission, agree upon the facts, or any of the facts involved therein, which stipulation shall be regarded and used as evidence at such hearing, investigation or other proceeding. It is desirable that the facts be thus agreed upon whenever practicable. The Commission may, nevertheless, require such additional evidence or information as it may deem necessary, and as may be authorized by law.

**RULE 17. Dismissal for Failure to Prosecute Complaint.** Whenever the complainant in any case refuses or neglects to furnish the Commission with additional information, or to perform any act regarded by the Commission as necessary or desirable for

the proper and further elucidation, investigation or prosecution of the case, for a period of fifteen days after being requested so to do, the Commission may forthwith dismiss the case, unless in its opinion it is of sufficient public interest and concern to demand its further prosecution and determination, in which event subsequent proceedings may be conducted as if the case had been instituted by the Commission.

**RULE 18. Subpœnas.** All subpœnas issued by the Commission shall be under the seal of the Commission, signed by a Commissioner or the Secretary of the Commission.

**RULE 19. Depositions.** The testimony of any aged, infirm, going or non-resident witness may be taken by deposition at the instance of a party to any proceeding or investigation before the Commission. The Commission may order the testimony of any such witness to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such deposition may be taken before any notary public, or any other person authorized to administer an oath, as provided by the laws of this Commonwealth, not being counsel or attorney to any of the parties, or otherwise interested in the proceeding or investigation. The same notice of taking depositions that is required by the Pennsylvania Equity Rules in taking depositions in civil cases must be given, in writing, by the party or his attorney proposing to take such deposition, to the opposite party or attorney of record, which notice shall state the name of the witness, and the time and place of the taking of his deposition, and like notice shall also be given the Secretary of the Commission. Provided, however, that not less than forty-eight hours notice shall be given in any case.

Every person whose deposition is taken shall be sworn or affirmed and the testimony shall be reduced to writing or typewriting by the officer taking the deposition, or under his direction, and shall be subscribed by the witness and attested by said officer.

**RULE 20. Briefs.** Upon all contested hearings, unless otherwise specially ordered, printed briefs containing legal arguments and citations of cases relied upon shall be filed on behalf of the parties. They shall contain an abstract of the evidence relied

upon by the party filing the same, and, in such abstract, reference shall be made to the pages of the notes of testimony where the evidence appears. The abstracts of the evidence shall follow the statement of the case and precede the argument. Briefs shall be filed with the Commission and served upon the adverse party or parties by the complainant, within fifteen days after the receipt of copy of the testimony where the same is ordered, otherwise, after the same has been concluded, and by the other party or parties, within ten days after receipt of complainant's brief, and the complainant shall have five days additional time for reply. Different times may be specially ordered in any case. Ten copies of each brief shall be filed for the use of the Commission with the Secretary, and shall be accompanied by advice of the date and manner of service upon the adverse party. At least three copies shall in each case be served upon the adverse party or parties. Briefs and other papers shall be printed and shall be nine (9) inches long and six (6) inches wide, with a margin of not less than one (1) inch, except in special cases, when, in the opinion of the Commission printing is impracticable, upon special order they may be typewritten.

**RULE 21. Service and Effect of Orders.** The manner of service, and effect of orders of the Commission, shall be as specifically prescribed by The Public Service Company Law. [See Art. VI, Sec. 13, Acts of 1913, P. L. 1424.]

**RULE 22. Financial Condition. Term as used in these Rules Defined.** Whenever a corporation, subject to The Public Service Company Law, is required or called upon to disclose its financial condition, such financial condition shall be given, so far as practicable, in appropriate schedules annexed to, and referred to, and properly designated in the petition. Such schedules shall show the following:

1. Date of incorporation and under what law or laws.
2. Amount and kinds of stock authorized.
3. Amount and kinds of stock issued.
4. Terms of preference of all preferred stock.
5. Brief description of each mortgage upon property of the corporation, giving date of execution, name of trustee, amount of in-

debtedness authorized to be secured thereby, and amount of indebtedness actually secured and outstanding, and brief description of the mortgaged property or collateral.

6. Number and amount of bonds authorized and issued, describing each class separately, giving date of issue, par value, rate of interest, date of maturity, and how secured.

7. Other indebtedness of all kinds, giving same by classes and describing security, if any.

8. Amount of interest paid during previous fiscal year, and rate thereof, and if different rates were paid, amount paid at each rate.

9. Amount of dividends paid during previous fiscal year, and rate thereof, and statement of the profit and loss account for the last five years previous to the filing of such statement.

10. Classified statement of earnings and expenditures for the previous fiscal year, and balance sheet showing condition at close of the year, and such additional information as the Commission may at any time require.

**RULE 23. Applications.—General Requirements.** All applications must be by petition, in writing, dated, signed and duly verified by the applicant, and shall in all respects conform to the specific requirements of the rules governing any particular application.

The petition must set forth the name and post office address of the applicant, and must show the name and address of its attorney, if any, and must contain a clear statement of the facts on which the application is based, with a request for the finding, determination, order, approval or certificate desired, and a reference to the particular provision of the law requiring or providing for the same.

Three copies of the petition shall be filed with the original.

The petition must contain such further statements as may be required by any provision of law, or of these rules, and must show in detail compliance therewith.

If maps, profiles or plans are filed with the petition, they must always be filed in triplicate, and one copy thereof shall be on tracing linen, unless waived by the Commission.

Whenever, under any of these rules, any map, profile, plan,

certificate, statement or other document is required to be filed with a petition, and the same has theretofore been filed with the Commission, the petition may state the fact of such filing, with the date and the proceeding in which, or occasion on which, the filing was made.

**RULE 24.** Application by a proposed public service company for approval of incorporation and of beginning of the exercise of any right, power, franchise or privilege under Article III, Sections 2 (a) and (b), [Acts of 1913, P. L. 1388], and Article V, Sections 18 and 19 [Acts of 1913, P. L. 1414, 1415], of The Public Service Company Law. Applications made to the Commission by any proposed public service company for a certificate of public convenience evidencing the Commission's approval of the incorporation, organization or creation of such company, and of the beginning of the exercise of any right, power, franchise or privilege under Article III, Section 2, (a) and (b), and Article V, Sections 18 and 19 of The Public Service Company Law, shall be by petition duly verified by the petitioner, and said petition shall, in addition to the requirements of Rule 23, contain and embrace as part thereof—

- (1) A certified copy of the right, power, franchise or privilege under any ordinance, municipal contract or otherwise.
- (2) The financial condition of the applicant as defined in Rule 22.
- (3) The manner in which it proposes to finance the proposed exercise of the right, power, franchise or privilege.
- (4) The nature and character of the service, a detailed description of the locality to be served, and maps and profiles showing the streets, avenues and all other places, locations and property in or upon or along which it is proposed to exercise such right, power, franchise or privilege.
- (5) The name and location of the principal office, plant and facilities of every public service company with which the proposed company may compete.



- (6) A detailed statement of the facts relied upon by the petitioner to show that the proposed incorporation or beginning of the exercise of the right, power, franchise or privilege, is necessary and proper for the service, accommodation, convenience or safety of the public.
- (7) An affidavit of at least two directors that it is the intention of the applicant to begin providing service within a time specified.

**NOTE:** The Secretary of the Commonwealth transmits to the Commission, along with a certified copy of the certificate of incorporation, a certificate to the effect that all existing laws relative to the incorporation, organization and creation of such proposed public service company have been complied with.

The Commission will fix the time and place of public hearing on such petition, of which notice, in the form prescribed below, shall be given by the petitioner, by publication, once a week, for two weeks, the last of which publications shall be at least five days preceding the date of hearing, in a newspaper published at the county seat or seats of the county or counties, and having a general circulation throughout the county or counties in which the proposed corporation intends to construct its facilities and furnish service to the public.

#### **Form of Notice to Be Published.**

Notice is hereby given that application will be made to The Public Service Commission of the Commonwealth of Pennsylvania for a Certificate of Public Convenience, evidencing the Commission's approval of the .....

(State if incorporation; or to begin the exercise of any right, power, franchise under any ordinance, contract, etc.)  
 of the .....

(Name of Public Service Company)  
 the purpose of which is .....

(State purpose.)

The public hearing on which will be held in the rooms of the Commission at Harrisburg, on the ..... day of .....

(Day)

(Month)

..... at ..... when and where all  
 (Year) (Hour)

persons in interest may appear and be heard, if they so desire.

Copies of the said petition, with notice of the time fixed for hearing, shall be served by the petitioner upon the public service companies with which the proposed company may compete, and proof of such service shall be filed with the Commission immediately after such service.

**RULE 25. Application by a Municipal Corporation for a Certificate of Public Convenience, under Article III, Section 3 (d), [Acts of 1913, P. L. 1388], and Article V, Sections 18 and 19 [Acts of 1913, P. L. 1414, 1415], of The Public Service Company Law.** Application by a municipal corporation for a certificate of public convenience, under Article III, Section 3-(d) and Article V, Sections 18, 19 of the Public Service Company Law, to acquire, construct, or to begin to operate any plant, equipment or other facilities for the rendering or furnishing to the public of any service of the kind or character already being rendered or furnished by any public service company within the municipality, shall be duly verified by the petitioner and shall, in addition to the applicable requirements of Rule 24, contain or embrace as part thereof :

1. The name and location of the principal office and plant, equipment or facilities of every public service company rendering like service within the municipality.

2. The names of the executive officers of such public service company, or companies.

3. A general statement of the amount and character of service rendered within such municipality by such public service company or companies.

4. A description, accompanied by maps, profiles, etc., of the plant, equipment, or other facilities proposed to be acquired, constructed or operated.

5. The manner in which it proposes to pay for, or finance the acquisition, construction and operation of the proposed plant, equipment or other facilities.

6. The facts showing that the approval applied for is necessary or proper for the service, accommodation, convenience or safety of the public.

7. The name of each and every corporation with which the

proposed exercise of the right, power, franchise or privilege may compete.

The Commission will fix the time and place of public hearing on such petition, of which notice, in the form prescribed below, shall be given by the petitioner, by publication, once a week, for two weeks, the last of which publication shall be at least five days preceding the date of hearing, in a newspaper of general circulation, published in the municipality making the application.

### Form of Notice to Be Published.

Notice is hereby given that application will be made to The Public Service Commission of the Commonwealth of Pennsylvania for a Certificate of Public Convenience, evidencing the Commission's approval of .....

(Name of Municipal Corporation)

to acquire, construct and operate .....

(Character of Service)

..... in the said .....

to be rendered)

(Name of Municipal Corporation)

The public hearing on which will be held in the rooms of the Commission at Harrisburg, on the ..... day of

(Day)

..... at ....., when and where

(Month)

(Year)

(Hour)

all persons in interest may appear and be heard, if they so desire.

Copies of the said petition, with notice of the time fixed for hearing, shall be served by the petitioner upon the public service companies with which the proposed company may compete, and proof of such service shall be filed with the Commission immediately after such service.

**RULE 26.** Application by a Public Service Company for a Certificate of Public Convenience, under Article III, Section 3 (a), [Acts of 1913, P. L. 1388], and Article V, Sections 18 and 19 [Acts of 1913, P. L. 1414, 1415], of The Public Service Company Law, to Renew its Charter or Obtain any Additional Rights, Powers, Franchises or Privileges, by any Amendment or Supplement to its Charter or Otherwise. When application is made by any public service company for a certificate of public convenience, under Article III, Section 3 (a), and Article V, Sections 18 and 19, of The Public Service

Company Law, to renew its charter, or obtain any additional rights, powers, franchises or privileges, by any amendment or supplement to its charter, or otherwise, the petition shall, in addition to the requirements of Rule 24, contain and embrace as part thereof :

1. A certified copy of the charter, and all amendments or supplements thereto, of the applicant, if one has not theretofore been filed with the Commission, and a reference to the statute or statutes under which said company has been incorporated, with date of incorporation.

2. If the additional right, power, franchise or privilege is proposed to be obtained by any amendment or supplement to its charter, a certificate from the Secretary of the Commonwealth to the effect that all existing laws relative to such amendment or supplement to its charter have been complied with.

3. If the additional right, power, franchise or privilege is proposed to be obtained otherwise than by amendment or supplement to the charter of the public service company, a certificate from the proper municipal or other governmental authority to the effect that existing laws, ordinances, or other governmental requirements have been complied with.

4. The facts showing that the approval applied for is necessary or proper for the service, accommodation, convenience or safety of the public.

The Commission will fix the time and place of public hearing on such petition, of which notice, in the form prescribed below, shall be given by the petitioner, by publication, once a week, for two weeks, the last of which publications shall be at least five days preceding the date of hearing, in a newspaper published at the county seat or seats of the county or counties, and having a general circulation throughout the county or counties in which the right to construct its facilities and furnish service to the public, will be given by the proposed amendment or supplement.

#### **Form of Notice to Be Published.**

Notice is hereby given that application will be made to The Public Service Commission of the Commonwealth of Pennsylvania, by ....., for a certificate

(Name of Public Service Company)

of Public Convenience, evidencing the Commission's approval of

.....  
(State Nature of Amendment or Supplement)

The public hearing on which will be held in the rooms of the  
Commission at Harrisburg, on the ..... day of  
(Day)

....., at ....., when and  
(Month) (Year) (Hour)

where all persons in interest may appear and be heard, if they so  
desire.

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Copies of the said petition, with notice of the time fixed for  
hearing, shall be served by the petitioner upon the public service  
companies with which the proposed company may compete, and  
proof of such service shall be filed with the Commission immedi-  
ately after such service.

**RULE 27. Application by a Foreign Public Service Com-  
pany for a Certificate of Public Convenience, under Article  
III, Section 3 (b) [Acts of 1913, P. L. 1388], and Article V,  
Sections 18 and 19 [Acts of 1913, P. L. 1414, 1415], of The  
Public Service Company Law, to obtain the Right to do  
Business within this Commonwealth.** When application is  
made by a foreign public service company for a certificate of  
public convenience, under Article III, Section 3 (b), and Article  
V, Sections 18 and 19 of The Public Service Company Law, to  
authorize such foreign public service company to do business  
within this Commonwealth, the petition shall contain and embrace  
as part thereof all the requirements of Rules 22, 23, and 24.

The Commission will fix the time and place of public hearing  
on such petition, of which notice in the form prescribed below,  
shall be given by the petitioner, by publication once a week for  
two weeks, the last of which publications shall be at least five  
days preceding the date of hearing, in a morning and evening  
newspaper published in the City of Harrisburg, and also in a  
newspaper of general circulation published in the municipality  
or municipalities where the proposed foreign corporation will  
furnish service to the public, if the charter rights of said company  
are limited to any particular municipality or municipalities.

### Form of Notice to Be Published.

Notice is hereby given, that application will be made to The Public Service Commission of the Commonwealth of Pennsylvania, by ..... a corporation

(Name of petitioning company)

of the State of ..... for a Certificate of

(Name state in which incorporated)

Public Convenience, evidencing the Commission's approval of the right of said corporation to do business within this Commonwealth. The nature of the business to be transacted and service rendered is as follows: .....

(State briefly the nature of business and service)

The public hearing on which will be held in the rooms of the Commission at Harrisburg, on the ..... day of

(Day)

....., at ....., when and

(Month)

(Year)

(Hour)

where all persons in interest may appear and be heard, if they so desire.

**RULE 28. Applications by a Public Service Company for a Certificate of Public Convenience, under Article III, Section 3 (c), [Acts of 1913, P. L. 1388], and Article V, Sections 18 and 19, [Acts of 1913, P. L. 1414, 1415], of The Public Service Company Law, to Sell, Assign, Transfer, Lease, Consolidate or Merge its Property, Powers, Franchises or Privileges, or any of them, to or with any other Corporation or Person.** When application is made by a public service company for a certificate of public convenience, under Article III, Section 3 (c) and Article V, Sections 18 and 19 of The Public Service Company Law, to sell, assign, transfer, lease, consolidate or merge its property, rights, franchises, or privileges, or any of them, to or with any other corporation or person, the petition shall, in addition to the requirements of Rule 24, contain and embrace as part thereof:

1. A certified copy of the charter, with all amendments and supplements thereto, of each corporation party to the transaction, or affected thereby, if not theretofore filed with the Commission, and a reference to the statute or statutes under which such corporations have been incorporated, and dates of incorporation.

2. The financial condition of the applicant and each corporation party to the transaction, as such financial condition is defined in Rule 22, and a statement of the manner in which the proposed consolidated corporation is to be capitalized and financed.

3. In detail, the reasons upon the part of each applicant for making the proposed sale, assignment, transfer, lease, consolidation or merger, and the facts showing that the transaction, the approval of which is sought, is necessary or proper for the service, accommodation, convenience or safety of the public, and all other facts which should be known by the Commission, to enable it to pass upon the application. Such petition shall be joined in by all the parties to the proposed transaction.

4. The originals of all contracts of sale, assignment, lease, consolidation or merger, and of all other writings or documents which form a part of, or in any manner affect, the proposed transaction, together with one copy, certified by the parties thereto, of each of such contracts, writings, or documents, and a copy of any and all franchises or privileges that may be involved in such transaction, certified to be such by the proper governmental authorities granting the same.

The Commission will fix the time and place of public hearing on such petition, of which notice, in the form prescribed below, shall be given by the petitioner, by publication, once a week, for two weeks, the last of which publication shall be at least five days preceding the date of hearing, in a newspaper published at the county seat or seats of the county or counties, and having a general circulation throughout the county or counties, in which the petitioning public service company has constructed its facilities and is furnishing service to the public.

#### **Form of Notice to Be Published.**

Notice is hereby given that application will be made to The Public Service Commission of the Commonwealth of Pennsylvania by ..... for a Certificate

(Name of petitioning company)

of Public Convenience, evidencing the Commission's approval of the .....

(State if sale, assignment, transfer, lease, consolidation or merger)

of its .....  
 (State if property, rights, franchises or privileges)

to the .....  
 (Name or names of other party or parties to transaction)

The public hearing on which will be held in the rooms of the Commission at Harrisburg, on the ..... day of  
 (Day)

....., at ....., when and  
 (Month) (Year) (Hour)  
 where all persons in interest may appear and be heard, if they so desire.

**RULE 29. Applications for Certificate of Public Convenience to Purchase, Acquire, Take or Hold, in Absolute Ownership or in Pledge, a Controlling Right, Title or Interest in another Public Service Company, under Article III, Section 6 (c), [Acts of 1913, P. L. 1392], and Article V, Sections 18 and 19, [Acts of 1913, P. L. 1414, 1415], of The Public Service Company Law.** When application is made by any public service company for a certificate of public convenience to purchase, acquire, take or hold, either in absolute ownership or in pledge, a controlling right, title or interest in any other public service company, under Article III, Section 6 (c), and Article V, Sections 18 and 19 of The Public Service Company Law, the petition must be made by the public service company proposing to purchase, acquire, take or hold, and must, in addition to the requirements of Rule 24, contain and embrace as part thereof :

1. The financial condition (defined in Rule 22) of the applicant and of the corporation, the purchase, acquisition, taking or holding of the controlling right, title or interest in which the approval of the Commission is sought.

2. The reasons why the applicant desires to purchase, acquire, take or hold the controlling right, title or interest, and the amount of the stock or securities, or the nature and extent of the right in such other public service company already owned or held by the applicant, if any.

3. The price proposed to be paid for such controlling right, title or interest, the terms and manner of payment, the market value of the stock or other securities representing such controlling right, title or interest, and the highest and lowest price for which



such stock or other securities sold during the period of at least one year immediately prior to the application, together with the dividends or income thereon, if any, paid for a period of five years immediately prior to such application.

The Commission will fix the time and place of public hearing on such petition, of which notice in the form prescribed below, shall be given by the petitioner, by publication, once a week, for two weeks, the last of which publications shall be at least five days preceding the date of hearing, in a newspaper published at the county seat or seats of the county or counties, and having a general circulation throughout the county or counties in which the public service company, whose right, title or interest it is proposed to purchase or acquire, has constructed its facilities and is furnishing service to the public.

#### Form of Notice to Be Published.

Notice is hereby given that application will be made to The Public Service Commission of the Commonwealth of Pennsylvania by ..... for a Cer-

(Name of petitioning company)

tificate of Public Convenience, evidencing the Commission's approval of .....

(State if purchase or acquisition and if absolute or pledge)

....., of the controlling right, title and interest, in the .....

(Name of public service company whose right it is proposed to acquire)

The public hearing on which will be held in the rooms of the Commission at Harrisburg, on the ..... day of

(Day)

....., at ....., when and

(Month)

(Year)

(Hour)

where all persons in interest may appear and be heard, if they so desire.

**RULE 30. Long and Short Transmission of Telegraph and Telephone Messages.** When application is made by a telegraph or telephone company for a certificate of public convenience to charge less for a longer than for a shorter distance service for the transmission of messages or conversations over the same line or route, in the same direction, under the provisions of Article III, Section 10, [Acts of 1913, P. L. 1394], and Article

V, Sections 18 and 19 [Acts of 1913, P. L. 1414, 1415], of The Public Service Company Law, the petition, in addition to the requirements of Rule 23 must contain and embrace as part thereof:

1. Such facts in connection with the matter and the reasons for the desired relief as may be relied upon by the applicant as justifying such relief.

2. Such schedules or data, if any, as the Commission's applicable orders or instructions may from time to time specify.

**RULE 31. Application under Article II, Section 1 (d), [Acts of 1913, P. L. 1378], of The Public Service Company Law for Restriction of the Number and Character of Tariffs and Schedules, and number of Offices or Stations at which such Tariffs and Schedules are required to be Posted.** When application is made to the Commission for permission to limit and restrict the number and character of tariffs and schedules and the number of offices or stations at which the same are required to be posted, under Article II, Section 1 (d) of The Public Service Company Law, the petition shall, in addition to the requirements of Rule 23, contain and embrace as part thereof:

A statement in detail of the reasons which, in the view of the applicant, warrant the granting by the Commission of the relief applied for, and such other facts, data and information in connection with the matter, as may be specified from time to time in the Commission's orders or instructions.

(See General Orders and Amendments or Supplements relative to this subject from time to time issued or to be issued.)

**RULE 32. Application for Permission to make Changes in Tariffs or Schedules, upon less than Thirty Days' Notice, under Article II, Section 1 (f), [Acts of 1913, P. L. 1379], of The Public Service Company Law.** When application is made by a public service company under Article II, Section 1, (f) of The Public Service Company Law, for allowance of changes in tariffs or schedules upon less than thirty days' notice to the Commission and to the public, posted and published in the manner, form and places required, with respect to the original tariffs or schedules.

The requirements of General Order No. 9 [1 P. C. R. 181], or

any future alterations, changes or amendments of said order, shall be followed.

A detailed statement of all the facts, circumstances and conditions relied upon by the petitioner to warrant the granting by the Commission of the allowance applied for.

**RULE 33. Applications for Certificate of Public Convenience for the Construction, Alteration, Re-location or Abolition of any Crossing at Grade, or Above or Below Grade, under Article III, Section 5 [Acts of 1913, P. L. 1391], Article V, Sections 12, 18 and 19 [Acts of 1913, P. L. 1408, 1414, 1415] of The Public Service Company Law.** When application is made for a certificate of public convenience, under the provisions of Article III, Section 5, and Article V, Sections 12, 18 and 19 of The Public Service Company Law, for the construction, alteration, re-location or abolition of any crossing at grade, or above, or below, grade,

(a) Of public roads, highways or streets by railroads or street railways; or

(b) Of railroads or street railways by public roads, highways or streets; or

(c) Of railroads or street railways by railroads or street railways—the petition shall, in addition to the requirements of Rule 23, contain and embrace as part thereof :

1. If the application be for a certificate of public convenience for the construction, alteration, or re-location of such a crossing, map on scale of not less than 200 feet per inch, showing correctly the location of all tracks, buildings, structures, property lines, streets and roads in the vicinity of the proposed construction, alteration or re-location, or which may be, in any manner, affected thereby, and also complete plans and specifications of such proposed construction, alteration or re-location.

2. Profiles showing ground lines and proposed grade lines of approaches on such public roads, highways or streets, railroads or street railways, as may be affected by the proposed construction, alteration or re-location, and in case of grade crossings, these maps must show that no other construction is feasible.

In case of a contemplated crossing of a railroad by a railroad,

the profile of such railroads shall show the customary information for not less than one mile on each side of the proposed crossing.

3. If the application be for the construction of a crossing at grade, such facts, data and estimates of cost, or other facts and data relied upon by the applicant to necessitate or warrant the granting of permission to construct such crossing at grade, together with a detailed and accurate description of such safety devices, safeguards and other protective means, if any, as the applicant may believe should be installed, with detailed information concerning the same, and if the application be made by a public service company, the application shall set forth also, a specification of the proposed method of operating such crossing at grade, if permission to construct the same be granted.

With the petition to construct a crossing at grade shall be filed the maps and profiles, plans and specifications, above specified in this rule, and all other data and information which may be specified from time to time in the Commission's general orders or instructions, or which may be required in connection with any particular application.

4. If the application be for the abolition of such a crossing at grade, the petition, in addition to the above stated requirements, shall contain and embrace as part thereof :

An estimate of the cost and expense, including compensation to the owners of adjacent property affected, together with all facts, data and information upon which such estimate is based.

5. A statement of the facts relied upon by the petitioner to show that the construction, alteration, re-location or abolition of any such crossing is practicable and necessary or proper for the service, accommodation, safety or convenience of the public, shall be set forth in every such petition.

6. With the petition shall be filed a detailed statement, verified by affidavit, of the number of persons and vehicles of all kinds using the highway at point of crossing for at least one week.

7. The names and principal places of business of all other public service companies that may be affected by the construction, alteration, re-location or abolition of such crossing.

Copies of the said petition shall be served by the petitioner upon

each public service company, municipality, corporation or department or commission of the Government of the Commonwealth of Pennsylvania, affected by or concerned in the construction, alteration, re-location or abolition of such crossing, and proof of such service shall be filed with the Commission within three days of the filing of said petition.

The Commission will fix the time and place for public hearing on such petition on which notice in the form prescribed below shall be given by the petitioner, once a week, for two weeks, the last of which publications shall be at least five days preceding the date of hearing, in a newspaper of general circulation published in the municipality in which the crossing is located, and in the event that no such newspaper is published in that municipality, then in such newspaper published at the county seat of the county in which the said crossing is situate.

#### Form of Notice to Be Published.

Notice is hereby given that application will be made to The Public Service Commission of the Commonwealth of Pennsylvania by ..... for a

(Name of petitioner)

Certificate of Public Convenience, evidencing the Commission's approval of the .....

(Construction, alteration, relocation or abolition)

of crossing .....

(State if at grade—or above or below grade)

located at .....

(Here give location of proposed crossing)

The public hearing on which will be held in the rooms of the Commission at Harrisburg, on the ..... day of

(Day)

....., at ....., when and

(Month)

(Year)

(Hour)

where all persons in interest may appear and be heard, if they so desire.

**NOTE:** For the crossing of the facilities of one public service company by those of another, not covered by (a), (b), (c), see General Order No. 11 of the Commission [infra].

**RULE 34. Petitions for Reparation Under Article V, Section 5 [Acts of 1913, P. L. 1405] of The Public Service Com-**

**pany Law.** Application by any shipper, consumer, user or patron, for an order for reparation as against any public service company, under Acticle V, Section 5, of The Public Service Company Law, shall be by petition, which, in addition to the requirements of Rule 23, shall contain and embrace as part thereof :

Such facts in connection with the matter as may give the necessary information or as may be prescribed from time to time in the Commission's orders or instructions.

(See General Orders and Amendments or Supplements issued on Reparation.)

**RULE 35. Applications for Certificate of Valuation in Connection with the Proposed Issue of Stocks, Trust Certificates, Bonds, Notes or Other Evidences of Indebtedness, or other Securities, under Article III, Section 4 (a) [Acts of 1913, P. L. 1389], of The Public Service Company Law.** When application is made for a certificate of valuation, in connection with the proposed issue of any stocks, trust certificates, bonds, notes or other evidences of indebtedness, or other securities, under Article III, Section 4 (a), of The Public Service Company Law [Acts of 1913, P. L. 1389], the petition shall, in addition to the requirements of Rule 23 contain and embrace as part thereof :

The statement of facts, data and information required by Article III, Section 4 (b) of The Public Service Company Law [Acts of 1913, P. L. 1389], to be shown in certificates of notification. Such petition shall contain such additional facts, data and information as the Commission shall, from time to time, determine and prescribe, and shall be signed and verified by the affidavit of the treasurer, auditor, controller or other acting fiscal head of the petitioning public service company.

The Commission will fix the time and place of public hearing on such petition, of which notice, in the form prescribed below, shall be given by the petitioner, by publication, once a week, for two weeks, the last of which publications shall be at least five days preceding the date of hearing, in a newspaper published in the municipality where the principal office of the applicant is located, or, if there is no newspaper published in said municipality, in a newspaper published at the county seat of the county in which said office is located.

### Form of Notice to Be Published.

Notice is hereby given that application will be made to The Public Service Commission of the Commonwealth of Pennsylvania under the provisions of The Public Service Company Law, for a Certificate of Valuation, by the .....

(Name of applicant)

....., which proposes to issue .....

(Amount and description of securities to be issued)

A public hearing on this application will be held in the rooms of the Commission at Harrisburg, on the ..... day of

(Day)

..... 19.., at ..... o'clock, when

(Month)

(Year)

(Hour)

and where all persons in interest may appear and be heard, if they so desire.

**RULE 36. Petitions or Applications for the Approval of Contracts between Municipal Corporations and Public Service Companies, or for a Declaration by the Commission of the Terms and Conditions upon which it will grant its approval of such Contracts, if at all, under Article III, Section 11 [Acts of 1913, P. L. 1395], and Article V, Sections 18 and 19 [Acts of 1913, P. L. 1414, 1415], of The Public Service Company Law—and Hearings Thereon.** 1. Applications for the approval of contracts between municipal corporations and public service companies, under Article III, Section 11, and Article V, Sections 18 and 19 of The Public Service Company Law, shall be by petition for a certificate of public convenience, which petition, in addition to the requirements of Rule 23, shall set forth the facts relied upon by the petitioner to show that the granting of such certificate of public convenience is necessary or proper for the service, accommodation, convenience or safety of the public.

Said petition shall be accompanied:

(a) By the original contract, the approval of which is applied for, executed by the parties thereto.

(b) By a true and correct copy of such original contract, certified by the parties thereto.

(c) Ten additional true and correct copies of such contract.

2. Applications, before the consent of the local authorities has been obtained, for a declaration by the Commission of the terms and conditions upon which it will grant its approval of a contract between a municipal corporation and a public service company, if at all, under Article III, Section 11, of The Public Service Company Law, shall be by petition, which, in addition to the requirements of Rule 23, shall set forth the facts relied upon by the petitioner to show that the granting of a certificate of public convenience, upon an application therefor, is necessary or proper for the service, accommodation, convenience or safety of the public.

Said petition shall be accompanied by ten true and correct copies of the proposed ordinance which the applicant proposes to accept as evidencing the proposed contract between such applicant and a municipal corporation, or shall be accompanied by the the contract proposed by the applicant and also by the municipal corporation, to be made by and between them, however evidenced, and containing all the terms, stipulations and conditions thereof, and shall be further accompanied by a copy of the notice of such application required by Article III, Section 11, of The Public Service Company Law to be given to the local authorities concerned, with proof of service of such notice. Such notice shall specify the date upon which such application to the Commission is to be made by the public service company.

3. All such contracts submitted to the Commission for approval shall contain the following provision :

"It is hereby understood and agreed that neither the purpose nor intent, nor the obligation of this contract, if and when approved by the Public Service Commission of the Commonwealth of Pennsylvania, is such as, to impair or in any wise affect the exercise by said Commission of any of the powers vested in it by the Public Service Company Law, approved July 26, 1913."

4. Upon the filing of the petition for the approval of the contracts between municipal corporations and public service companies, or upon petition for a declaration by the Commission of



the terms and conditions upon which it will grant its approval of such contracts, if at all, under Article III, Section 11, of The Public Service Company Law, and under this rule, the Commission will fix a time and place of hearing, which shall be public, and of which due notice, in the form prescribed below, shall be given by the applicant, by publication, once a week, for two weeks, the last of which publication shall be at least five days preceding the date of hearing, in a newspaper of general circulation, published in the municipality in which the contract is to be effective, and, in the event that no such newspaper is published in that municipality, then in such newspaper published at the county seat of the county in which the municipality is situate.

### Form of Notice to Be Published.

Notice is hereby given that application will be made to The Public Service Commission of the Commonwealth of Pennsylvania for the approval of a contract .....

between .....

(Name of Municipal Corporation)

..... and .....

(Name of Public Service Company)

..... for .....

(Here briefly specify substance of contract)

The public hearing on which will be held in the rooms of the Commission at Harrisburg, on the ..... day of

(Day)

....., at ....., when

(Month)

(Year)

and where all persons in interest may appear and be heard, if they so desire.

5. Copies of the petition, with notice of the time fixed for hearing, shall be served by the petitioner upon the public service company or companies with which it may compete, and proof of such service filed with the Commission immediately after such service.

**RULE 37. Other Applications.** All applications relating to matters over which the Commission has jurisdiction, and which are not governed by any of the preceding rules, shall be made

by petition and shall conform to the requirements of Rule 23, and such other rules and regulations as the Commission may, from time to time, prescribe.

**RULE 38. Practice and Procedure on Petitions—General.** Upon the filing of any petition required by these rules, the Commission will examine the same to see whether it establishes a prima facie case for action on the part of the Commission, and conforms to the provisions of The Public Service Company Law and these rules. If the petition fails in any of these respects, the Commission will give notice of the defects to the applicant, who may correct the same.

If the petition be found to establish a prima facie case for action and to comply with the provisions of The Public Service Company Law and with these rules, the Commission may appoint a time and place for a hearing on the same, as may be required by law.

The Commission will, by general rule or order, or by special rule or order, in each case, direct what notice of the hearings shall be given by publication, or otherwise.

All hearings shall be public and at or before the hearing the applicant, or petitioner, shall present due proof of the publication or service of the notice thereof, in the manner prescribed by the Commission. At the hearing the applicant, or petitioner, must be prepared to establish all the facts alleged in the petition by evidence, but the Commission may, in its discretion, where authorized by law, in any case so to do, grant the application upon the petition and accompanying papers.

The applicant must furnish for the use of the Commission, in reaching a determination upon any application, the originals, or certified or verified copies, of all books, papers and documents, as the Commission may require. The failure so to do shall be ground for refusing the application.

**RULE 39. Compliance with Orders.** Upon the issuance by the Commission of an order against any public service company or companies, such public service company or companies must promptly, upon compliance with its requirements, notify the Secretary that action has been taken, in conformity with the order,

and when a change in rates is ordered by the Commission, such notice must be given in addition to the filing and posting of a tariff or schedule, or supplement thereto, showing such change in rates.

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## OPINIONS.

PENNSYLVANIA RUBBER CO., WESTMORELAND SPECIALTY CO.,  
PITTSBURGH LAMP, BRASS & GLASS CO., MCKEE GLASS CO.,  
AMERICAN WINDOW GLASS CO. *v.* PENNSYLVANIA RAILROAD  
Co.

*In re rates on coal from Penn, Biddle, Irwin and Hahntown to  
Jeanette and Grapeville, Pa.*

*Discrimination—Special rates on coal hauled in producers' cars—  
Reasonable rates—Determination of—When valuation of  
property is necessary.*

Complainants protest against the withdrawal by the respondent of certain special rates on coal carried in cars belonging to the producers, and allege that rates per ton subsequently established are unreasonable.

Complainants also urge that certain hauls from colliery to main line, along main line a short distance, and thence to a siding, is a switching service and not a road haul.

*Held:* 1. The granting of a lower rate on coal hauled in producers' cars than for that hauled in carriers' cars gives an undue and illegal advantage to consignees receiving the lower rate, and gives an unlawful power to the producer to discriminate by determining which of the consignees shall receive shipments in producers' cars.

2. In determining whether particular rates are reasonable, and especially in deciding whether particular rates are unjustly discriminatory or unduly preferential, it is discretionary with the Commission whether a valuation of any or all of the property of a public service company shall be made, and, if the Commission decides that a valuation is necessary, the statute prescribes what the Commission *may*, not what it *must* consider, in arriving at a fair valuation.

3. A switching service is generally understood to be a movement of a car from one point to another within a station or terminal area. The movements in this case are not such. Although the distance over which the car moves upon the main line of the railroad is short, there is technically, at least, a road haul.

4. Certain of the rates established declared unreasonable and others prescribed.

## COMPLAINT DOCKET NO. 211—1914.

Submitted May 20, 1914.

Decided July 23, 1914

## Report and Order of the Commission.

*Berne H. Evans*, for the Commission.*Robt. W. Smith*, for Penna. Rubber Co. et al.*W. T. Lowe*, for American Window Glass Co.*Henry Wolfe Bikle*, for Pennsylvania Railroad.

## COMMISSIONER JOHNSON :

Jeannette is situated on the main line of the Pennsylvania Railroad, 26.6 miles east of Pittsburgh and 4.1 miles west of Greensburg. Grapeville is also on the main line of the Pennsylvania Railroad, one-half mile east of Jeannette.

The complainants in this proceeding are five companies having manufacturing plants at or near Jeannette and Grapeville. All but one of the plants at Jeannette are located on the so-called Jeannette Branch, a short road 1.3 miles in length, branching southward from a point on the main tracks of the Pennsylvania Railroad, between Jeannette and the first station to the west, which is called Penn. The other plant near Jeannette is located on the Bull Run Branch, which extends for nine-tenths of a mile northward from the main tracks of the Pennsylvania Railroad, also from a point between Jeannette and Penn.

The industries at Jeannette and Grapeville secure coal from collieries located near Penn, Biddle, Irwin and Hahntown. Penn, Biddle and Irwin are located on the main line of the Pennsylvania Railroad. Penn Station is one and one-half miles west of Jeannette; Biddle about three miles from Jeannette; Irwin about five miles from Jeannette, and Hahntown, which is located on the Youghiogheny Branch, a short distance from the main line of the Pennsylvania Railroad, is about six miles from Jeannette.

The collieries near Irwin and Biddle are owned by the Westmoreland Coal Company; those near Penn and Hahntown by the Penn Gas Coal Company, which company however, is owned by the Westmoreland Coal Company. All four collieries are con-

trolled by the Westmoreland Coal Company. Both the Penn Gas Coal Company and the Westmoreland Coal Company are owners of a large private car equipment which they have used in shipping the coal purchased by the companies complainants in this proceeding.

Prior to June 1, 1914, the rate on coal, when shipped in producers' cars, was \$2.50 per car from each of the four collieries to consignees' sidings at Jeannette. The rate to Grapeville on coal moved in producers' cars was \$3.00 per car, the rates to Grapeville being quoted only from Penn and Biddle. Higher rates were charged on coal shipped in cars owned by the railroad company, the rates to Jeannette being \$5.00 per car from Penn, and thirty cents per long ton of 2240 pounds from Biddle, Irwin and Hahntown. The rates to Grapeville were twenty-eight cents per long ton from Penn and thirty cents per ton from Biddle, Irwin and Hahntown. Effective June 1, 1914, the Pennsylvania Railroad Company withdrew the rates of \$2.50 per car to Jeannette and \$3.00 per car to Grapeville on coal moved in producers' cars, and established a new schedule of rates on coal moved in railroad owned and all other cars, the rates now in effect to Jeannette being fifteen cents per long ton from Penn (Penn Gas Slope No. 5), twenty cents per ton from Biddle, twenty-five cents from Irwin and thirty cents from Hahntown. The present rates to Grapeville are fifteen cents per long ton from Penn, twenty-five cents from Biddle and thirty cents from Irwin. The rates in effect both prior to and subsequently to June 1, 1914; and the distance which the coal moves by the several rates are shown by the accompanying table, taken from the record of the proceeding:

[RATES PER TON ON COAL HAULED ON CARRIERS' CARS.

	Prior to June 1.	Since June 1.	Approximate Distances.
Penn to Jeannette .....		15 cents	1.5 miles
Biddle to Jeannette .....30 cents		20	3.
Irwin to Jeannette .....30		25	5.
Hahntown to Jeannette .....30		30	6.
Penn to Grapeville .....28		15	2.
Biddle to Grapeville .....30		25	3.5
Irwin to Grapeville .....30		30	5.5
Hahntown to Grapeville .....30		30	6.5
			Ed.]

While the special rate on coal shipped in producers' cars was in effect, all coal was handled in producers' cars at \$2.50 per car to Jeannette and \$3.00 per car to Grapeville. The withdrawal of these rates and the substitution of the rates per ton indicated in the table effected a large increase in the freight rates. The increased burden is borne by the complainants in this proceeding.

Coal is purchased by the complainants F. O. B. at the colliery, the freight being paid by the buyer of the coal. At the present time the rate paid by the complainants is the fifteen cents per ton charge from Penn to Jeannette and Grapeville. For the standard style hopper car, which is largely used, this amounts to \$7.50 per car, or about three times the charge paid by consignees at Jeannette prior to June 1, 1914.

The issues raised in this case involve three questions:

*First.*—Is it lawful and equitable for the rate to be lower on coal shipped in producers' cars than when shipped in cars belonging to the carrier?

*Second.*—Are the rates that were put in effect June 1, 1914, reasonable?

This involves incidentally the question—

*Third.*—Whether the service performed for the rates charged is a switching movement or a road haul.

I. Is it lawful for a railroad to charge lower rates on coal when shipped in cars owned by the shipped than when transported in cars owned by the carrier? The Coal Freight Agent of the Pennsylvania Railroad—the official by whom the rates under consideration were fixed—testified that special rates at Jeannette and Grapeville on coal when shipped in producers' cars would be the only instance of such preference granted by the Pennsylvania Railroad. At no other point in the State is there any lower rate granted on coal shipped in private equipment than when moved in railroad owned cars. The witness stated that he considered the preference was one that could not lawfully be made.

The granting of a special rate on coal when moved in producers' cars enabled certain buyers of coal mined at the collieries owned or controlled by the Westmoreland Coal Company to obtain an advantage or preference in rates that other buyers of coal at the same collieries could not secure. The users of coal at Jeannette and Grapeville were granted a preference not allowed other

consumers of coal. Furthermore, the existence of a lower rate on coal when moved in producers' cars would enable the owners of the collieries, who have the power to determine whether private cars or railroad equipment shall be used, to decide what buyers should enjoy the lower rate and what consumers of coal should pay the higher charge. A system of charges that makes possible such discrimination in the rates paid by the buyers of transportation would be a violation of the fundamental principles of the common and statutory law regarding the charges of common carriers.

Again, if it were lawful for the carrier to charge a lower rate on coal shipped to Jeannette and Grapeville from the collieries owned or controlled by the Westmoreland Coal Company, it could be lawful only upon the condition that a like lower rate was charged on coal whenever and wherever shipped in producers' cars. The preference in the rate granted to shippers using private instead of railroad cars would have to apply generally to all producers' cars at all points in the State. This is clearly required by Article 3, Section 8, of The Public Service Act of July 26, 1913:

*Section 8.* It shall be unlawful for any public service company—

(a) To charge, demand, collect or receive, directly or indirectly, by any special rate, rebate, drawback, abatement or other device whatsoever, from any person or corporation, for any service rendered or to be rendered, a greater or less compensation or sum than it shall demand, charge, collect, or receive from any other person or corporation for a like and contemporaneous service under substantially similar circumstances and conditions.

(b) To make or give any undue or unreasonable preference or advantage in favor of or to any person or corporation or any locality, or any particular kind or description of traffic or service, in any respect whatsoever; or to subject any particular person or corporation or locality, or any particular kind or description of traffic or service, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

The rates on coal shipped to Jeannette and Grapeville are paid by the consumers, and the granting of a lower rate when the coal

is moved in producers' cars is clearly an abatement in the rate that would be secured by a limited number of coal consumers, and by consumers located in only one section of the State. The preference granted is clearly in violation of Paragraph B of Section 8, Article 3, above quoted. Accordingly, it must be decided, and it is held that the lower rate on coal to Jeannette and Grapeville, which prevailed prior to June 1, 1914, when moved in producers' cars, than when transported in railroad owned cars, was illegal.

II. Are the rates now in force on coal to Jeannette and Grapeville from Penn, Biddle, Irwin and Hahntown just and reasonable?

It is contended in the brief submitted by one of the complainants that this question cannot be decided upon the evidence before the Commission, because the defendant has not presented and the Commission has not determined "the capital investment of the respondent company necessarily employed in or about the particular service." The attorney for the complainant argues that "Section 20 of Article 5 of the Act specifically sets forth the matters which shall be considered by the Commission in the determination of the reasonableness of any given rate. It must determine and consider the fair value of the property of the public service corporation in order to ascertain whether the particular rate under investigation which it is proposed to increase, brings in a fair return."

The attorneys for the plaintiff have misread the Act. The statute gives the Commission authority, after hearing, to determine whether rates are unjust or unreasonable, "or unjustly discriminatory or unduly or unreasonably preferential," and if the rates are found to be unduly discriminatory or preferential, the Commission shall prescribe the "maximum, just, due, equal and reasonable rates." (Article 5, Section 3.) It is provided by Section 20 of Article 5 that the Commission has the power to determine the fair value of the property of the public service corporation "whenever it shall deem such valuation or determination necessary or proper under any of the provisions of this Act," and the same section of the law provides that "in ascertaining and determining such fair value, the Commission may determine every fact, matter or thing which in its judgment does or may have any bearing on such value."



In determining whether particular rates are reasonable, and especially in deciding whether particular rates are unjustly discriminatory or unduly preferential, it is discretionary with the Commission whether a valuation of any or all of the property of a public service company shall be made, and, if the Commission decides that a valuation is necessary, the statute prescribes what the Commission *may*, not what it *must* consider, in arriving at a fair valuation.

A railroad company, as the complainant argues, is entitled to receive from its entire schedule of rates, fares and charges, "a fair return upon a reasonable value of the property at the time it is being used for the public," (San Diego Land Company vs. National City, 174 U. S., 739), but this broad question does not necessarily arise in deciding whether the particular rate or rates applying to but one commodity or to but few articles is unjustly discriminatory or preferential. If the contention of the plaintiff were valid, and a valuation were required to decide upon every complaint regarding local rates or fares, the Commission would be powerless to afford effective relief to complainants and the statute could accomplish but little in the regulation of transportation charges.

The changes made in the rates on coal to Jeannette and Grapeville, effective June 1, 1914, were the withdrawal of the \$2.50 per car rate from Penn, Biddle, Irwin and Hahntown to Jeannette, and of the rate of \$3.00 per car to Grapeville from Penn and Biddle on coal moved in producers' cars; the reduction in the rate on coal shipped in railroad owned cars, Irwin to Jeannette, from thirty cents to twenty-five cents per ton, Biddle to Jeannette from thirty cents to twenty cents, Biddle to Grapeville from thirty cents to twenty-five cents, Penn to Grapeville and Pittsburgh Lamp, Brass and Glass Company's siding at Jeannette, from twenty-eight cents to fifteen cents, and the increase in rates on coal shipped in railroad cars from Penn (Penn Gas Slope No. 5) from \$5.00 per car to fifteen cents per ton. In each case the ton is the long ton of 2240 pounds.

Prior to June 1, 1914, the complainants received practically all the coal in producers' cars at the \$2.50 and \$3.00 rates, which rates must have been assumed by the carrier to have been equiva-

lent to the several rates in force to Jeannette and Grapeville on coal shipped in cars owned by the railroad. If the rates on coal moved in producers' cars were not equivalent to the rates on coal moved in railroad cars, one or the other of the two classes of rates must have been illegal, because it is clear that the carrier could not lawfully have had two different rates for the same transportation service.

For the reasons that have been set forth, the abatement in the rate for coal when shipped in producers' instead of railroad owned cars was the granting of an unlawful preference to the users of coal at Jeannette and Grapeville, and the respondent acted in accordance with the requirements of the law in withdrawing the rates of \$2.50 to Jeannette and \$3.00 to Grapeville on coal moved in producers' cars.

There remain two questions to decide: Is the rate of fifteen cents per long ton from Penn (Penn Gas Slope No. 5), to Jeannette and Grapeville reasonable, and are the rates that have been established from Biddle, Irwin and Hahntown to Jeannette and Grapeville equitably related to the rates from Penn to Jeannette and Grapeville?

The rate of \$2.50 to Jeannette appears, from the record in the proceedings, to have been established in 1893, and it is the opinion of the present Coal Freight Agent of the defendant carrier that this low rate was fixed to enable slack coal, for which there was then little demand, to be marketed. This reason for the establishment of the \$2.50 rate is not admitted by the complainants, and the fact is not established. There is, however, little doubt that the rate was a low one, especially when applied, as it was, to the larger sizes and more valuable grades of coal. The reasons given by the defendant for establishing the rate of fifteen cents per long ton, from Penn to Jeannette, were stated as follows:

By Mr. BIKLE:

Q. Now, in fixing this rate at 15 cents per ton, what led you to regard that as a proper charge?

A. I am of the opinion that fifteen cents per ton, considering what a car can earn, the conditions just mentioned of car supply, and other conditions, that fifteen cents is a nominal rate.

Q. Why did you fix the rate from Penn to Jeannette?

A. In order to make it comparative with minimum road haul in that vicinity.

Q. Do you know of anything lower in the territory for similar movements?

A. I do not.

By COMMISSIONER JOHNSON:

Q. Can you cite similar movements where the rate is fifteen cents?

A. I think I can recall four or five. These are all distances running from .6 miles to a mile and a half. We have from the Graydon Coal Works on our Conemaugh Division, which was our old West Penn Division, to deliveries in Tarentum; from the Kerr Coal Company, at Lane, which is on the Butler Branch of the same division above Butler Junction, to the town of Freeport; then there is another I think of from the Pine Run Coal & Coke Company from Vandergrift to Hyde Park. We have another that I think of now from Everson, on our Southwest Penn Branch, running down to Uniontown to the town of Scottdale. They are all from .6 miles to a mile and a half.

The same witness, Mr. Clevenger, also testified that there has been such an increase in the size of cars during the twenty-one years, since 1893, as largely to justify the higher rates that were made effective June 1, 1914. It appears, furthermore, that the Pennsylvania Railroad, on the first of April, 1903, advanced its rates on coal ten cents per ton on long hauls and five cents per ton on short hauls, but that the rates to Jeannette and Grapeville were not increased at that time. It was stated by the witness that the Jeannette and Grapeville rates were overlooked and for that reason were not increased along with other coal rates.

The testimony concerning the increase in the size of cars is somewhat contradictory. The witness for the defendant was not informed as to the size of cars that have been used since 1893 in supplying coal to the complainants at Jeannette and Grapeville. A witness for one of the complainants, the Pennsylvania Rubber Company, presented a record of the average lading of the coal cars received by that company from 1903 to 1913, and his figures show but slight increase in the average load. It is hardly possible

however, to accept the record of the Pennsylvania Rubber Company as to the size of cars used by it, as expressive of the average size of cars used generally ten or twenty years ago in supplying consumers with coal at Jeannette and elsewhere. The official statistics collected and published by the Interstate Commerce Commission show that the average capacity of all coal cars owned by the railroads in the United States in 1901 was thirty-one tons; in 1907 thirty-eight tons, and in 1911 forty-two tons. The increase in the average capacity of railroad owned coal cars during the decade 1901-1911 was 35 1-2 per cent. From these figures it would appear that if railroad equipment had been used, and coal cars of average capacity had been employed for supplying coal to consumers at Jeannette and Grapeville, the car-load rate paid in 1901 would have been for the transportation of thirty-one tons of coal and in 1911 for the movement of forty-two tons. It is a well-known fact that there has been a steady growth in the average capacity of coal cars.

III. It is strongly urged by the complainants that the movement of cars from the colliery at Penn Gas Slope No. 5 to the sidings of the complainants at or near Jeannette is not a line or road haul, but a switching service. The witness for the defendant defined a switching service as a movement or haul "within the jurisdiction of one agency limit," and it is generally understood that a switching service is the movement of a car from one point to another within a station or terminal area. The service performed in the transportation of coal from the colliery at Penn Gas Slope No. 5 to consignee on the Jeannette Branch involves the movement of the car from the colliery to the tracks of the main line of the Pennsylvania Railroad, then the movement of the car over a comparatively short distance on the main line to the Jeannette Branch, and along the Jeannette Branch to the siding of the consignee. This is not a switching service in the ordinary acceptance of the term. It is not a movement from one point to another within a station or terminal area. Although the distance over which the car moves upon the main line of the railroad is short, there is technically at least, a road haul. The service from Irwin, Biddle and Hahntown to consignees at Jeannette and Grapeville is unquestionably a line or road haul, and not an ordinary switch-

ing service. The question as to whether the service for the rates complained of is or is not a switching movement is considered here, not because it was deemed of special importance, but because the point was urged by the complainants. As a matter of fact, switching charges are often a rate per ton instead of per car, and if the services performed by the defendants were held to be a switching movement, the complainants would not necessarily be entitled to rates per car instead of per ton of freight moved.

The facts do not indicate the rate of fifteen cents per long ton from Penn (Penn Gas Slope No. 5) to the sidings of the complainants at Jeannette and Grapeville to be unreasonable. Fifteen cents per ton is the lowest short line haul rate on coal charged by the defendant carrier within the State. The present coal rate from Penn, Biddle, Irwin and Hahntown to Greensburg, 4.1 miles east of Jeannette, is thirty cents per long ton. In relation to the rate to Greensburg, the rate from Penn to Jeannette and Grapeville cannot be considered unreasonably high. The rate of fifteen cents per long ton from Penn (Penn Gas Slope No. 5) to Jeannette and Grapeville is accordingly held to be reasonable.

The rate of twenty cents per long ton from Biddle (Westmoreland Shaft) to Jeannette, is also held to be reasonable.

It does not appear, however, that the rate to Grapeville from Biddle should be higher than the rate to Jeannette. The difference in distance is slight, and it is hereby held that the rate from Biddle to Grapeville shall be reduced from twenty-five cents to twenty cents per long ton of 2240 pounds. The rate of twenty-five cents per long ton from Irwin (South Side Colliery) to Jeannette is held to be reasonable, and it is held that the same rate should apply from Irwin to Grapeville. The rate of thirty cents per long ton from Hahntown (Penn Shaft No. 2) to Jeannette is held to be unreasonable. The difference in distance between Irwin to Jeannette and Hahntown to Jeannette, does not justify a rate from Hahntown five cents higher than the rate from Irwin. The rate from Hahntown to Greensburg being thirty cents, a reasonable rate from Hahntown to Jeannette would, and is held to be, twenty-five cents per ton of 2240 pounds.

An order will be entered directing the respondent company to put in force the rates here held to be reasonable, and to make

whatever adjustment that may be required to bring intermediate rates in line with those hereby established.

ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matter and things involved having been had, and the Commission having on the date hereof, submitted and filed of record a report containing its findings of facts and conclusion thereon, which said report is hereby referred to and made a part hereof.

Now, to wit, July 23, 1914: *It is ordered*, that the Pennsylvania Railroad Company, respondent, put in force the rates held to be reasonable in the aforesaid report of the Commission, and make whatever adjustment that may be required to bring intermediate rates in line with those established by said report, on or before September 15, 1914.

By the Commission,  
F. M. WALLACE, *Acting Chairman*.

APPLICATION OF HARMONY ELECTRIC CO., PROTEST OF PENNA.  
POWER CO.

*Approval of contract with municipality—Competition—Satisfactory service by company enjoying present franchises.*

The petitioner, an electric light and power company, having no plant equipment except a lease upon a power plant nine miles distant from the Borough of Elwood, asks approval of a contract for furnishing light and power to the residents of said borough.

The protestant, an electric light and power company, has over \$300,000 invested in plant equipment within the limits of said borough, and has been supplying satisfactory and efficient service for many years.

The borough is small, and does not show any indication of unusual industrial development in the near future. The bids offered by the petitioner and the protestant are practically the same, and public sentiment with regard to the approval of the contract, is strongly divided.

*Held*: The contract between petitioner and the said borough should not be approved.

Before a Certificate of Public Convenience is issued it must be established that the desired service is necessary and proper for the accommo-

dation, safety or convenience of the public. The Commission is not justified in permitting competition, nor taking such action as to invite it, unless the area and population served, the needs of the community, or the prospects of the municipality, as based upon its growth and development, reasonably show that the public welfare demands it.

The power to regulate a public utility by law is corollary to the duty to protect its property and the interests of the public and investors from unnecessary and ruinous competition.

In doubtful cases it is safer to draw the line against rather than in favor of competition.

Attitude of Commissions of other states considered.

(See also Schuylkill Light, Heat & Power Co.'s Petition, 1 P. C. R. 122, and Borough of Exeter's Petitions, *infra*.—*Ed.*)

### MUNICIPAL CONTRACT DOCKET No. 60.

#### Report and Opinion of the Commission.

Submitted Feb. 3, 1914.

Decided July 3, 1914.

*Walter Lyon*, for Applicant.

*George E. Alter*, for Protestant.

#### COMMISSIONER BRECHT:

In re application for approval of contract between the Harmony Electric Company and the Borough of Ellwood City, the record shows that on January 31, 1914, an application was filed with the Public Service Commission by the Harmony Electric Company, whose office is located at Pittsburgh, Pennsylvania, for the approval of a contract made with the Borough of Ellwood City, in Lawrence County, Pennsylvania, to supply the aforesaid borough with electric current. The contract submitted for approval was entered into by the respective parties to it for a period of ten years on the 3d day of January, 1914, under an ordinance approved by the borough council on the last day of December, 1913.

The petition of the Company sets forth that the Harmony Electric Company was incorporated under the laws of Pennsylvania "for any carrying on the business of supplying light, heat and power by means of electricity, to the public," that by virtue of an ordinance of the Borough of Ellwood City, "the contract set forth in said ordinance has been duly entered into between the parties;" that the said borough can obtain its "necessary electric

current more economically than itself can manufacture the same."

A protest was filed in due course of time by the Pennsylvania Power Company, located and operating in the Borough of Ellwood City against the approval of the contract of the petitioner by this Commission. It is alleged in the protest that the application should be refused on the ground that the Harmony Electric Company has no facilities nor equipment of its own to supply current; that it has not sufficient capital to make adequate provision to supply current to the various communities it has undertaken to furnish under its charter; that in the judgment of the representative business men of the borough aforesaid the contract should be disapproved; that the bids submitted by the Pennsylvania Power Company were a better offer, from the standpoint of the borough's interests, than the bid of the petitioner; that the protestant company has facilities to furnish current far superior to those at the command of the applicant, and that the said company "has been serving the community of Ellwood City with singular efficiency for years."

At the hearing held in this proceeding the attention of the Commission was called to the following facts respecting the status of the petitioner: The Harmony Electric Company was organized on December 31, 1913, by the consolidation of twenty-six (26) small electric companies with a capital stock in the aggregate of \$130,000; a few days later, in January following, the merger or consolidated company was re-organized and the capital stock reduced to \$25,000, the total amount of stock now authorized by the aforesaid Harmony Electric Company.

On the same day the merger was completed, the Harmony Electric Company leased the power plant of the Pittsburgh, Harmony, Butler and New Castle Railway Company from that corporation at an annual rental of \$18,000. This power plant is located, as was testified, about nine miles from Ellwood City, and heretofore was used and will continue to be used under the present arrangement to supply the Railway Company with power, to operate its line of cars. Under the terms of the lease the Electric Company must not only supply the Railway Company with power, but is required to keep up all necessary repairs and improvements of the plant in question.



Testimony was offered to show that the power plant leased had sufficient generating capacity to supply current to all the communities the Light Company expects to serve and sufficient power to operate the lines of the Railway Company. It was also stated, and the fact not controverted, that since the lease went into effect there has been no construction of additional transmission lines in connection with the plant, nor have any changes or improvements been made in the power plant itself whereby the distribution of current to Ellwood City might be more easily effected and maintained.

According to evidence submitted at the hearing, the respondent to this proceeding, the Pennsylvania Power Company, started operations in Ellwood City about twelve years ago, and has supplied that municipality with electric current ever since. The company has a capital stock of \$400,000, and owns a plant equipment in the borough representing an investment of approximately \$350,000. The power plant operated by it consists of two 500 kilowatt steam turbines and two 625 kilowatt water turbines which are about being supplemented by connections with an outside power plant of 30,000 kilowatt capacity, whereby a supply of current can be obtained in case of emergency or accident. The light and service furnished to the borough, it appears, were adequate and satisfactory. On January 7, 1914, the contract, under which the Pennsylvania Power Company supplied the Borough of Ellwood City with electric current, expired.

On the 22d of September, 1913, the secretary of the borough council wrote to the Pennsylvania Power Company and to the Ellwood Electric Company, subsequently merged by letters patent into the Harmony Electric Company, stating that he was "authorized to receive bids for furnishing the borough with electric current, for a five-year contract, and a ten-year contract, in accordance with enclosed ordinance."

When the bids received were opened on October 7, 1913, it was found that the bid of the Ellwood Electric Company, later Harmony Electric Company, was a flat rate of 1.5 cents per kilowatt hour, that of the Pennsylvania Power Company a flexible rate of 2.2 cents per kilowatt hour based upon a sliding scale so adjusted that the respondent contends that in a ten-year contract under

conditions as they exist at Ellwood City the proposed bid would produce an average rate of 1.27 cents per kilowatt hour.

The committee, believing that the offer of the Ellwood Company was the lower bid, accordingly recommended that the contract be awarded to that company. When the respondent company learned that its bid was rejected, it was led to believe that the bid was not understood, and some time in December following, it presented a supplemental or alternative bid providing for a flat rate of 1.7 cents for a period of one year, or a flat rate of 1.5 cents for five years with the privilege extended to the borough of renewing the rate at the expiration of the first five year period for five years longer. It also permitted the sliding bid submitted at the first instance in October to stand. It further offered at the expiration of its contract in January, 1914, to furnish current at one and one-half cents per kilowatt hour, which it has been doing since that time, and will continue to furnish current at the aforesaid rate until it shall receive notice from the borough council to discontinue such service.

On the 31st day of December, 1913, an ordinance was approved giving the Ellwood Electric Company the right to furnish electric current to the Borough of Ellwood City. A few days later on the 2d day of January, 1914, a "contract for electric service was made and entered into between Ellwood City and the Ellwood Electric Company, which contract was assumed on that same day by the Harmony Electric Company by which the contracting company agreed to furnish electric current at the flat rate of 1.5 cents per kilowatt hour for a period of ten years beginning January 7, 1914.

A clause, known as Section 7, was written into the ordinance to protect the borough in case of any failure on the part of the light company to furnish current of the quality and character and in the amount required by the agreement. This particular clause was not satisfactory to many of the citizens because it was believed that it did not adequately protect the borough and insure continuous service. Therefore, when the new council went into office in January, 1914, a new ordinance was passed repealing the ordinance of the preceding December under which the contract was awarded. The burgess, however, vetoed the repealing ordinance and was sustained in his veto. Thereupon council passed

a resolution, by a vote of 5 to 4, requesting this Commission to disapprove the contract which the borough had made with the Harmony Electric Company.

This action of council was supplemented by a petition signed by sixty of the most prominent business men of the community, which was forwarded to the Commission, joining in the request from council for the disapproval of the contract.

In this proceeding the size of the municipality, the attitude of the community with respect to the proposed service, the relative merits of the bids first submitted, and the general principle of competition under conditions such as exist at Ellwood City, should be given due weight and consideration in reaching a conclusion.

Ellwood City is a small municipality of about 4,500 people and shows during the past decade the ratio of increase in population that is usually found in communities of that size. There is no present indication of any special development in its industrial life nor any other special inducement that would warrant several public service companies to enter this particular field and engage in the business of supplying electric current.

For a period extending over twelve years the electric current of Ellwood City has been furnished by a company that has over \$300,000 invested in plant equipment within the borough limits. Testimony was offered showing that the service given was sufficiently adequate to meet all the requirements of the community, and that in a period of four years there has been a total interruption of only six minutes during the regular hours of lighting.

It is now proposed that a contract given to a new company to furnish current from a railway power house nine miles distant be approved, although the new company has no visible asset in plant equipment excepting a lease, and although the trend of sentiment in the community, as reflected in a resolution passed by the present council and a petition signed by the leading business men, is against such approval.

Furthermore, the relative merits of the bids submitted have been a source of more or less dispute and contention between the parties in interest. The situation has been further complicated by the injection of the supplemental bid on the part of the respondent

company which offers the same flat rate as the one which was accepted when the contract was awarded. This second or supplementary bid was presented on the ground, as respondent contends, that the bid on a sliding basis, submitted in the first instance, was evidently not understood, since it is able to demonstrate, from the amount of current now being consumed in Ellwood City, that the so-called sliding bid was lower than the one accepted.

The fact that the present council in January, only a few weeks after the contract-ordinance was approved by the old council on the last day of the preceding December, passed a resolution by a vote of 5 to 4 asking this Commission for a disapproval of the contract, and the additional fact that the representative business men joined by petition in the request of council, indicate that there is quite a division of opinion in the community of Ellwood City concerning either the relative merits of the bids originally submitted or the status of the bids now before council.

But the chief point at issue in this proceeding is the principle of competition between public utilities under conditions as they now exist at Ellwood City. The record shows that the Pennsylvania Power Company is located in Ellwood City and has an investment of \$350,000 in a plant equipment within the borough limits; that the Harmony Electric Company has leased a power plant nine miles from the borough limits and contends that it is ready to begin operations as soon as its contract is approved and a Certificate of Public Convenience issued by this Commission. In the event of the approval of the contract, there will be two competing companies operating in a small municipality where one of these companies was heretofore able, without taxing its capacity, to furnish all the light that was required and of a quality that was wholly satisfactory to the people of the community. Under the conditions as existing it could hardly be contended with success that it would in any wise be an advantage to Ellwood City or to the two companies competing to allow such a contingency to arise.

It is a matter of common observation that where the policy of promoting competitive traffic between corporations engaged in public service business is too freely encouraged, more especially in communities of limited population, the practice is followed as

a rule by consequences that are disastrous to all the interested parties. The community that consumes the commodity, the utility that furnishes the service, the general public that invested in good faith, must all be properly safeguarded in their rights and interests when a public service company is invited to enter a municipality to do business under competitive conditions.

The spirit of the act creating this Commission contemplates that this very thing be done. Before a Certificate of Public Convenience is issued, it must be established that the required service is necessary or proper for the accommodation, convenience or safety of the public.

The Commission is not justified in permitting competition anywhere nor taking such action as may invite it, unless the area and population served, the needs of the community, or the prospects of the municipality as based upon its growth and development reasonably show that the public welfare demands it.

This principle of protection must also be extended to the public utility to the end that the individual citizens who have invested in its plant equipment in good faith may be duly protected in their interests. Therefore, a public service company located in a small municipality where it is rendering adequate and satisfactory service, where it has invested thousands of dollars in a plant, where it can furnish all the service which the community may require, where an additional plant if permitted to be established would make it extremely hazardous for either company to maintain itself, is entitled to the same protection under the law when there is an invasion of its vested rights and interests as the citizens of that community when a public utility company trespasses upon their rights. This idea is based on the principle that the power or authority to regulate the service of a public utility by law carries with it as a corollary the duty to protect the property of the utility whenever that is threatened with consequences that may endanger the future existence of the company.

This general view that competition between public utilities must be restrained under certain conditions and not encouraged too readily is in accord with the reports and opinions of the public service commissions of several of the leading states in the country. In Vol. 2 of its reports the Wisconsin Commission said:

"Active and continuous competition between utilities, furnishing the same service to the same locality, seems to be out of the question. This has been shown by experience. Such competition is also contrary to the very nature of things. Two distinct and separate corporations are not likely to remain separate very long after it becomes clear that the service rendered by both can be more cheaply and more effectively furnished by only one of them."

This is substantially the view taken by the Commissions of New York, New Jersey, Massachusetts, and other states. The language of the New York Commission of the First District is as follows:

"Practically all utilities are so situated that but one can economically and satisfactorily serve a community."

The New Jersey Commission held:

"In the case of ordinary industrial concerns competing or desiring to compete in serving the public, the traditional presumption is in favor of permitting such competition. \* \* \* \* This presumption, however, commonly fails in the case of public utilities operating under franchises."

The same general view is advanced by the Public Service Commission of the State of Massachusetts in the following language:

"Competition is sure to be expensive, even though for a time apparently economical and profitable. \* \* \* \* The temporary advantage to a portion of the public is reasonably sure to be followed by an undue burden upon the public as a whole through the larger capital demanding a return, much of it representing unnecessary duplication of properties as well as losses."

The Commission is not unmindful of the fact that the line is not always clearly drawn between competition that might be encouraged and that which should be denied. But under a system of public regulation, such as is provided by the act under which the Public Service Commission of the Commonwealth exercises administrative powers, it is safer to draw the line against rather than in favor of competition that appears to be of doubtful propriety. This seems to be the proper view to take of the matter, since there is no remedy through the action of the Commission to pre-

vent the harm that will be done to the business interests of the community by unwise competition when once established; whereas under the regulating powers of the Commission, which in effect may be said to have all the checks and restraints of normal, well-balanced competition, there can be no harm done to the community by the corporation left in sole control of the business of furnishing the required public service of a municipality.

Therefore, in view of the fact that Ellwood City is a small municipality supplied by a public utilities company with light that is admitted to be entirely satisfactory and in all respects adequate to meet the needs of the community; that the two companies to this proceeding are now offering to furnish the light to the borough at the same rates, that the borough is seriously divided in the matter of the approval of the contract, the trend of sentiment being apparently against it, and that the experience of public utilities in other places shows that two companies in active competition could not supply a small borough like Ellwood City with service at reasonable rates and continue in business for any length of time, the Commission is of the opinion, that competition under such conditions should be restrained and not permitted to enter the said municipality, and accordingly it recommends that the approval of the petitioner's contract in this proceeding be refused and the application dismissed.

#### ORDER.

This case being at issue upon petition and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

*Now, to wit, July 9, 1914, It is ordered:* That the petition in this proceeding be and it is hereby dismissed.

By the Commission,  
FRANK M. WALLACE, *Acting Chairman.*

**BOROUGH OF EXETER'S PETITION.**

*In re petition of the Borough of Exeter for the approval of franchise-contract granted to Consumers' Electric Company of the Borough of Exeter.*

*Approval of franchise-contract—Competition—Unsatisfactory service by company enjoying present franchises—Remedy.*

The petitioning borough asks approval of a franchise-contract with the Consumers' Electric Co., giving said company the right to erect poles, wires, etc., and supply electricity to its citizens.

The Citizens' Electric Illuminating Co., which has been operating for many years under franchises granted by the borough, protests, contending that public necessity does not require the operation of two companies within the borough.

There is some evidence of unsatisfactory service by the latter company, and some complaint as to excessive rates.

*Held:* 1. Under the circumstances, the contract should not be approved. Where two public service companies enter into active competition in a small field, there will be inevitable duplication of facilities, followed by merger; and as rates must, under the law, provide for a fair return upon the value of the property employed in public use, they will be higher after such competition than before. The Commission cannot approve such competition, knowing that when it is called upon to fix rates it will be compelled to provide for a return upon an investment unnecessarily made.

2. The remedy for inadequate or unsatisfactory service, under the Public Service Company Law, is by complaint to the Commission, and not by encouraging competition.

(See Schuylkill Light, Heat & Power Co.'s Petition, 1 P. C. R. 122, and Application of Harmony Electric Co., *infra*.—*Ed.*)

**MUNICIPAL CONTRACT DOCKET No. 34.****Report and Order of the Commission.**

Submitted Dec. 29, 1913.

Decided July 21, 1914.

*Robt. W. Archibald and W. W. Hall, for Borough of Exeter.*

*E. E. Beidleman and W. L. Pace, for Consumers' Electric Co.*

*Lyman D. Gilbert, Frederic W. Fleitz and Benjamin R. Jones, for Citizens' Electric Illuminating Co.*



**COMMISSIONER TONE:**

The Borough of Exeter, Luzerne County, presented December 27, 1913, its petition, asking for the approval by the Public Service Commission of a franchise-ordinance and amendment, giving and granting unto the Consumers' Electric Company of the Borough of Exeter, Luzerne County, Pennsylvania, a franchise in said borough.

The petition of the borough states that the said borough was incorporated on the 8th day of February, 1884; that on November 21, 1913, the town council of the borough passed an ordinance authorizing the Consumers' Electric Company of the Borough of Exeter to erect and maintain poles, wires, and other necessary appliances upon, over and along the streets, lanes, alleys and other public places of, and to exercise its franchise in the Borough of Exeter; that on February 16, 1913, the council of the borough passed an ordinance amending Section III of the aforementioned ordinance by adding the following: "And it is hereby understood and agreed that it is not the purpose or intent, nor is the obligation of this contract, if and when approved by the Public Service Commission of the Commonwealth of Pennsylvania, such as to impair or in any wise affect the exercise by said Commission of any of the powers vested in it by the Public Service Company Law, approved July 26, 1913; that all of the legal steps necessary in the passage and publication of the ordinance have been properly taken and performed; that the Consumers' Electric Company of the Borough of Exeter has accepted, in writing, said ordinance and the amendment thereto."

Following the receipt of the above petition and the fixing of January 20, 1914, as the date for the public hearing on the same, a protest against the approval of said franchise-ordinance was filed by the Citizens' Electric Illuminating Company of Pittston, Penna., alleging that it, the Citizens' Electric Illuminating Company, was duly authorized on the 4th day of October, 1898, by the council of the Borough of Exeter, to "erect and maintain poles upon and wires and appliances over and along the streets, lanes, and alleys of the said borough for supplying such light, heat and power or any of them that the said company is or may be authorized to do, and to distribute the same, etc."; that it "did enter

upon the streets of said borough with its poles and wires, and since that time has been continuously supplying to the municipality and inhabitants thereof an adequate and sufficient supply of light, heat and power by means of electricity at reasonable rates"; that it maintains a distributing system in said borough consisting of upwards of 21 miles of wire, with approximately 219 poles, together with meters, transformers and other appliances; that its system and plant have been continuously in operation and entirely adequate to supply all demands for electric current and power in said borough; that the population of the borough is about 3,500; that the Borough of Exeter, by reason of its large geographical area and small scattering population, does not present a commercially attractive investment field for one company, much less for two; that there is no necessity for two electric light companies to operate within the boundaries, and not enough business to warrant two companies operating therein, in such a manner as to give good and sufficient service, at reasonable rates; that to permit another company to enter said borough will work irreparable injury to the protestant and its investment, and confer no benefit upon the inhabitants of said borough; that such additional company is not "necessary or proper for the service, accommodation, convenience or safety of the public."

The franchise-ordinance the approval of which is petitioned for, grants a general franchise to the Consumers' Electric Company for supplying electricity to the inhabitants of the borough, subject to various and proper regulations as to erection and protection of poles and wires and the use and obstruction of the streets; fixes a minimum monthly charge not exceeding 50 cents per month for any one customer, fixes a maximum rate for current, not exceeding 10 cents per killowatt hour; limits the term of the franchise to 60 years; provides for use of the company's poles by the borough and free current for its fire alarm system.

The testimony and exhibits presented at the hearings show that the Citizens' Electric Illuminating Company was incorporated April 9, 1888, "for the purpose of supplying light, heat and power by means of electricity to the public in the contiguous boroughs of Pittston and West Pittston and Hughestown, in Luzerne County, Pa., and to persons, partnerships and corporations residing

therein and adjacent thereto as may desire the same and supply customers with necessary appliances to utilize the same"; and that on December 23, 1889, it surrendered its said charter, and accepted and received a new one in accordance with the act of May 8, 1889; and on July, 1913, said company was merged with several other electric light companies, retaining its original name in the new "Letters Patent" issued.

The evidence indicates that the Borough of Exeter is adjacent to and joins the Borough of West Pittston; that the rates charged and service given in the past have been the same as in the Boroughs of Pittston and West Pittston; that the company has never received any complaints as to its service to commercial and residence customers; that there are at present 109 such customers in the borough from whom the gross yearly revenue is about \$4,500.00, the maximum rate being 10 cents per kilowatt hour, and the minimum monthly charge to any one customer being \$1.00; that the generator capacity of the power station aggregates 2,100 kilowatt, on which the maximum demand at any one time is about 900 kilowatt.

Conflicting testimony was presented as to the character of the service which is now, or has been of late, rendered. It was also testified and not contradicted that two lighting companies could not exist in the Borough of Exeter.

The evidence and investigations made by representatives of the Commission show that the plant and facilities of the Citizens' Electric Illuminating Company are ample and sufficient for properly serving and supplying all the demands for electric current throughout the territory in which it is authorized to do business. The particular complaint against the service, as specified in the testimony, referred to the variation in the intensity of illumination or fluctuation of the lamps, which in as much as the capacity of the plant is shown to be ample, is due, if it exists, either to the improper and insufficient regulation of its equipment at the generating station, or to an improper wire distribution system. The regulation of its equipment at the generating station can be improved by the company, either by installing additional regulating devices, or by operating more generators at the times of heavy loads or by both. The distribution system can be diagrammed

with reference to the loads on each branch and portion thereof and where found deficient, brought up to a proper standard by additional wiring.

It is provided in the rules relating to supplying Gas, Electric, Water and Steam Heat Service by Utilities, adopted by the Commission April 9, 1914, [1 P. C. R. 153-178], and since promulgated forthwith, that utility companies shall make systematic inspection and procure the apparatus necessary for and make and maintain complete records of its service in order that representatives of the Commission making examination of such records at any time can determine whether the service being rendered by the utility has been and is sufficient, proper and satisfactory.

The Commission is about to notify all public service companies to, at once, procure the apparatus and equipment necessary for and to inaugurate the system of keeping the records of their service and inspection as provided for in the said Service Rules. When this is done by the utility, the Commission can then promptly and definitely determine whether the service is maintained at a proper standard, and when and to what extent variations therefrom occur; and the utilities will be required to operate all plants so as to render and give proper and sufficient standard service.

In Article V, Section 18, of the Act of July 26, 1913, it is provided, "When application shall be made to the Commission by any public service company for permission from the Commission to begin the exercise of any right, power, franchise or privilege; or when application shall be made to the Commission by any public service company for any approval under any of the provisions of this act, such approval, in each and every such case, or kind of application, shall be given only if, and when the said Commission shall find or determine that the granting or approval of such application is necessary or proper for the service, accommodation, convenience or safety of the public."

The petitioner, the Borough of Exeter, requests the approval of the franchise-ordinance, in order to provide competition in the supplying of electric current to its residents, for the purposes of securing,—first, better service, and,—second, lower rates for such current.

In the matter of securing improved service over that now ren-

desired, the same result can be accomplished by petition to the Commission for an investigation of the present existing service, and, if the same be found deficient, by the Commission requiring the company now supplying the current to improve its methods, plant and equipment in such manner as the Commission shall direct. Such results will be ultimately effected by the Commission under its system of regulation and inspection about to be inaugurated.

In the matter of lower rates for electric current, no formal testimony or proof was offered by the petitioner against the reasonableness of the rates for residence and commercial lighting now charged by the company furnishing the present service. The petitioner, however, acting in the matter in November, 1913, which was previous to the time of jurisdiction over utilities conferred upon the Public Service Commission, most naturally follows the past custom of inducing and encouraging competition in its endeavor to control or improve the service and rates for electricity supplied to its inhabitants. The efforts of municipal authorities to secure lower rates for services rendered by utility companies are commendable and should be encouraged; but, the final and ultimate effect upon the rates deserves most careful consideration, if it is endeavored to bring about the results by the method of competition.

Previous to the jurisdiction of the Public Service Commission over utilities as provided by the Act of July 26, 1913, and in full effect January 1, 1914, the only method by which municipal authorities could hope for improved service or lower rates, or both, from companies furnishing public service to their communities, was by creating public sentiment therefor and by the means of competition; and which while it existed, was to some extent productive of the results desired. But the history of practically all utility corporations throughout the Commonwealth, shows that where competing companies were operating in the same territory, or even adjacent territory, there have inevitably been consolidations and mergers, and the status of competition has remained in effect for but limited periods of time.

Assuming competition to be in effect, or now by the approval of the Commission to be established, and assuming a community to

be enjoying rates, whether promulgated by the utilities regardless of the cost of plant or cost of service, or otherwise, a time will arrive when a determination of a just and fair rate for the services must be made; and the question must be submitted to the Commission or other authority having jurisdiction at that time. Consideration should, therefore, now be given to the result or future effect in any rate investigations or determinations, of authorization or of the existence in a community of two or more utilities to supply essentially the same service.

Unless by mutual private understanding between utilities, by which each occupies separate territory in a community, in which case there is no actual competition, each competing utility must possess a plant and furnish equipment and supplies sufficient to accommodate its customers and whatever reasonable additional demands may be made upon it, and reasonable facilities for emergencies. This will require each utility to duplicate to a more or less extent the equipment, plant and supplies of the other. In the matter of fixing rates by any Commission or other authority, definite rules have been laid down by the courts, that must be followed if the determinations are to be enforced. One of the first considerations is that the fair value of the plant and facilities of the utilities, used and useful in furnishing the service must be determined and considered as one of the principal functions in the fixing of rates. Another consideration of equal importance is that the rate must provide a proper allowance to cover annual depreciation of plant and facilities and the cost of maintaining business.

These principles, clearly laid down by the courts, must be followed in all rate determinations hereafter, and where applied to a community served by more than one utility, the resulting valuations of property, amounts set aside to cover depreciation and the cost of maintaining the business, for several companies will inevitably aggregate more than if the same community be served by one utility. Consequently the valuations thus made and allowances to be provided for out of the rates will necessarily result in the fixing and determining of rates materially greater and higher than would occur if but one utility were in operation.

It becomes then impossible for rate regulating bodies, to authorize the establishment of competing utilities in one community, without in the future, when petitioned, or when undertaking to determine and fix the fair rates to be charged by the several utilities in such community, being confronted with the requirement of fixing a valuation for the properties of the utilities and making allowances for depreciation and cost of maintaining the business, much in excess of what would be the case, had there been no duplication of plant and facilities by competing companies.

It is evident, therefore, that the action of a municipality in granting franchises to competing public service companies, as compared with that of rate regulation by State authority, may produce the contrary effect of increasing rates for service by a public utility, although the opposite result is sought to be obtained by the means of competition; and, it would appear that a rate regulating body, by authorizing or approving competition, may place itself in the anomalous position of voluntarily creating a situation that results in unnecessarily high rates. The ultimate effect upon the rates is the essential point to be determined after a due consideration of all the facts of a situation.

In considering the petition for approval of the franchise-ordinance, it is evident that the borough authorities, in November, 1913, clearly acted for the best interests of the inhabitants of the borough; but, now as, since January 1, 1914, the Public Service Company Law is in full force and effect, the results sought by the borough as to better and improved service with lower or reasonable rates can be attained by application or petition relative thereto to the Commission, and in that event without the burdens and complications hereafter arising from competing utilities.

It is therefore not believed by the Commission that the approval of the franchise-ordinance is necessary or proper for the service, accommodation or convenience of the public.

The approval of the ordinance is therefore withheld, and the application for its approval is dismissed.

## ORDER.

This case being at issue upon petition and protest, on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, submitted and filed of record a report containing its findings of facts and conclusions, which said report is hereby referred to and made a part hereof:

Now, to wit, July 21, 1914, *It is ordered:* That the petition in this proceeding be and is hereby dismissed.

By the Commission,  
F. M. WALLACE, *Acting Chairman.*

## BOROUGH OF EXETER'S PETITION.

*In re petition of the Borough of Exeter for the approval of a Street Lighting Contract with the Consumers' Electric Company of the Borough of Exeter.*

*Contract for street lighting—Competition—Refusal of company enjoying present contract to enter bid.*

The petitioning borough asks approval of a contract for street lighting made with a company which, at present, has no facilities within the limits of said borough. The contract was made after due advertisement for, and consideration of, bids.

Another company, which has furnished the borough with street lighting for years, but which declined to present its bid at the time of said advertisement, protests, contending that the approval of this contract would result in duplication of poles and wires in the streets, to the inconvenience and danger of the public.

*Held:* Under the circumstances, the contract should be approved.

MUNICIPAL CONTRACT DOCKET No. 35.

Report and Order of the Commission.

Submitted Dec. 29, 1913.

Decided July 21, 1914.

*Robt. W. Archibald and W. W. Hall, for Borough of Exeter.*

*E. E. Beidleman and W. L. Pace, for Consumers' Electric Co.*

*Lyman D. Gilbert, Frederic W. Fleitz and Benjamin R. Jones, for Citizens' Electric Illuminating Co.*



**COMMISSIONER TONE:**

The Borough of Exeter, Luzerne County, presented December 27, 1913, its petition, asking for the approval by the Public Service Commission of a contract made and entered into December 1, 1913, by the borough with the Consumers' Electric Company of the Borough of Exeter, Luzerne County, Penna., for the lighting of the streets and public highways of the borough, for a term of ten years, with 39 or more, standard Westinghouse, direct current series, arc lamps, at a rate of fifty-four (\$54) dollars per lamp per year.

An ordinance of the borough, passed in council, November 7, 1913, and approved by the burgess, November 17, 1913, provided that the borough enter into and execute a contract for the lighting of the streets and public highways of the borough with electric arc lamps, or with electric arc and tungsten lamps, or with gas lamps, according to specifications on file in the office of the secretary of the borough; and that upon the adoption of said ordinance and the specifications, the secretary should advertise for one week for sealed proposals to do said lighting; that the proposals should be submitted to the secretary of council, November 28, 1913, and opened by him at a meeting of council, to be held at 8 p. m. on that date; that council should award said contract; and that the burgess and secretary were authorized to execute such a contract on behalf of the borough.

Pursuant to said advertisement for proposals, the Exeter Electric Company, by its president, K. J. Ross, and the Consumers' Electric Company of the Borough of Exeter, Luzerne County, Penna., by its attorney, W. L. Pace, presented their sealed proposals to the secretary of council, and the contract for the lighting of the streets of said borough was thereupon awarded to the Consumers' Electric Company aforesaid.

Following the receipt, by the Commission, of the petition of the borough, and the fixing of January 20, 1914, as the date for the public hearing on the same, a protest against the approval of said lighting contract was filed by the Citizens' Electric Illuminating Company, of Pittston, Pa., alleging that it, the Citizens' Electric Illuminating Company, has since 1898, been continuously supply-

ing to the municipality and inhabitants of Exeter, Pa., an adequate and sufficient supply of light, heat and power by means of electricity at reasonable rates; that its system and plant are entirely adequate to supply all demands for electric current and power in said borough, and the current is supplied whenever wherever requested; that the population of the borough, according to the census of 1910, was about 3,500; that said company has been furnishing to the borough electricity for street lighting for more than 15 years; that there never have been any disputes about the contract for said street lighting, nor any complaints of the service rendered; that the approval of the said contract would result in the duplication of the poles, wires and plant now on the streets of the borough, and impose upon the borough an additional burden represented by the cost of said duplication, and create a competitive condition at variance with the spirit and letter of the Public Service Company Law.

The testimony and exhibits presented at the hearings show that the Citizens' Electric Illuminating Company has been furnishing electric light for the streets of the borough,—first, under a contract from 1898 to 1903, rate not stated; and,—second, under a contract for ten years terminating October 1, 1913, at a rate of \$72.50 per lamp per year, and using therefor 9.6 ampere, 550 watt, open arc type lamps; that from October 1, 1913, the said company has continued its street lighting service without a formal contract, charging at the rate of \$72.50 per lamp per year for three months, and since January 1, 1914, is charging therefor at the rate of \$60.00 (sixty dollars) per lamp per year; that when the borough, during November, 1913, advertised for proposals for street lighting, the Citizens' Electric Illuminating Company did not present any bids; that the proposals received by the borough at that time were, first, from the Consumers' Electric Company of Exeter, at a rate of \$54.00 per lamp per year; second, from the Exeter Light Company at a rate of \$55.00 per year; that the Exeter Light Company was incorporated by K. J. Ross, who is president of the Citizens' Electric Illuminating Company, and others; that neither the Consumers' Electric Company of Exeter, nor the Exeter Light Company, has any plant or equipment.

The protest of the Citizens' Electric Illuminating Company, the testimony at the hearings and the arguments and briefs of counsel, covered two applications made to the Commission by the Borough of Exeter,—one, for the approval of the contract for street lighting, and the other, for the approval of a franchise ordinance granting to the Consumers' Electric Company of the Borough of Exeter, the right to erect a plant and equipment upon the Borough streets for the purpose of furnishing electricity to the inhabitants of the borough. The latter question, the approval of the franchise ordinance, will be determined by the Commission in another and separate report. [See preceding case.]

The question involved in the present proceeding is the approval of the contract for street lighting.

Section 11 of Article III of the act of July 26, 1913, provides that "no contract or agreement between any public service company and any municipal corporation shall be valid unless approved by the Commission," and Section 18 of Article V of the same act provides that "when application shall be made to the Commission by any public service company for any approval under any of the provisions of this act, such approval, in each and every such case, or kind of application, shall be given only if and when the said Commission shall find and determine that the granting or approval of such application is necessary or proper for the service, accommodation, convenience or safety of the public."

In accordance with the ordinance passed November 7, 1913, the borough of Exeter advertised for proposals for street lighting, received the same November 28, 1913, and after due consideration, awarded the contract to the Consumers' Electric Company of the Borough of Exeter.

The testimony shows that the specifications, proposals and contract provide for a modern type of arc lamp, to be properly erected and maintained, and at a rate considerably less than the borough had previously been paying.

The protestant, the Citizens' Electric Illuminating Company, which had been formerly furnishing the street lighting service, did not submit any proposals, and therefore, as is also evidenced by the testimony, had withdrawn from the field as a competitor for the privilege of furnishing the street lighting.

Therefore, the borough council upon the opening of bids, November 28, 1913, was obliged to decide upon one of the several following methods for lighting its streets. It might, *first*, endeavor to secure from a gas company, lights for the streets;—*second*, undertake the construction of a municipal electric light plant,—*third*, endeavor to compel the Citizens' Electric Illuminating to continue furnishing its service, which would involve much uncertainty as to what the rates would be, as the same, if not mutually agreed upon, would require determination by either the Public Service Commission or the courts, or possibly by both, and at a considerable period of time thereafter,—*fourth*, to accept the bid of the Exeter Electric Company at the rate of \$55.00 per lamp per year,—or *fifth*, to accept the bid of the Consumers' Electric Company of Exeter at the rate of \$54.00 per lamp per year.

The action of the borough in accepting the latter proposition appears to have been the wisest under all of the circumstances, and particularly as they existed on November 28, 1913, and up to December 1, 1913.

The contract entered into December 1, 1913, contains the following provision: "It being understood and agreed that the company not being in a position at the present time to light the streets of the borough as above specified, that said company shall have the right to erect such poles and string such wires, within the borough, under the direction of the burgess and street committee of council, as may be necessary to carry out the requirements of this contract."

While full consideration is due and has been given, by the Commission, to the protest of the Citizens' Electric Illuminating Company, and to the answer to the same by the Consumers' Electric Company of Exeter, and to the facts as presented by both, it is believed that the more important matter involved is that of the Borough of Exeter procuring the lighting of its streets in the most feasible and satisfactory manner that was presented to it on November 28, 1913. Such lighting was an absolute necessity for the borough. The action of the municipal authorities was open to the public and duly authorized and published. It cannot be maintained that the action of the borough created a competitive situation with the interests of the Citizens' Electric Illumi-

nating Company relative to the street lighting, as the officers of that company testify that it had decided not to, and did not submit any proposals for such lighting.

The Commission is of the opinion that the contract for street lighting as submitted is in proper form, and is necessary and proper for the safety and convenience of the public and should be approved; and that the Borough of Exeter and the Consumers' Electric Company of the Borough of Exeter, be authorized to proceed to fulfill the obligations and carry out the terms thereof.

#### ORDER.

This case being at issue upon petition and protest, on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, submitted and filed of record a report containing its findings of facts and conclusions, which said report is hereby referred to and made a part hereof:

Now, to wit, July 21, 1914, *It is ordered:* That a Certificate of Public Convenience be issued evidencing the Commission's approval of the contract between the Borough of Exeter and the Consumers' Electric Company of the Borough of Exeter for the lighting of the streets of said borough, for a period of ten years.

By the Commission,

F. M. WALLACE, *Acting Chairman.*

#### BOROUGH OF BUTLER'S PETITION.

*The petition of the Borough of Butler for the issuance of a Certificate of Public Convenience approving the location and erection of a viaduct in the borough over the tracks and facilities of the Baltimore and Ohio Railroad Company and the Bessemer and Lake Erie Railroad Company, and the apportioning of the cost of the construction of such viaduct.*

The Borough of Butler is divided into two parts by a creek along either bank of which a railroad runs and across which the borough proposes to build a viaduct, so as to eliminate the grade crossings over tracks and to provide a more ready, safe and convenient route of travel from one part of

the borough to the other. A street railway occupies streets in both parts of the borough, but has no connection over the creek.

After careful consideration the Commission approved the plans for the viaduct, and divided the expense of the same between the parties as follows:

30 per cent. to be paid by each of the two lines of railroad,  
30 per cent. by the Borough, and  
10 per cent. by the street railway.

#### APPLICATION DOCKET NO. 1.

#### Report and Order of the Commission.

Submitted Feb. 17, 1914.

Decided June 16, 1914.

*John H. Wilson*, for the Borough of Butler.

*R. P. Scott*, for B. & O. Railroad Co.

*E. S. Templeton*, for Bessemer & Lake Erie Railroad Co.

*Chas. R. Hosford, Jr.*, for Pittsburgh & Butler Electric Rwy. Co.

*John H. Jackson*, for Butler County.

*W. Z. Murrin*, for property owners in Butler.

*Jas. C. Hutchinson*, for other property owners.

#### COMMISSIONER PENNYPACKER:

The Borough of Butler, situated in the County of Butler, has a population of about twenty-five thousand. The Conoquenessing Creek, flowing through a narrow valley between rather high hills, divides the town into two parts. Upon the north side live about twenty thousand people, and upon the south side five thousand. Center avenue is the principal thoroughfare, and crossing the creek, it connects the two parts of the borough.

The double track main line of the Pittsburgh, Bessemer and Lake Erie Railroad Company, operated by the Bessemer and Lake Erie Railroad Company, crosses Center avenue at grade, and runs immediately north of the creek. This railroad does a large freight business, and trains running east and west cross Center avenue at frequent intervals both day and night.

The main track and two sidings of the Pittsburgh and Western Railroad Company, operated and owned by the Baltimore and Ohio Railroad Company, cross Center avenue at grade a short distance south of the creek. All of the passenger and freight trains of the Northern Division of the Baltimore and Ohio Railroad Company, all of the passenger and freight trains of the Buffalo, Rochester and Pittsburgh Railroad Company, and the passenger trains of the Bessemer and Lake Erie Railroad Company cross Center avenue during the day and night. Cars and trains from the yards of the Baltimore and Ohio Railroad Company, which lie directly to the east of Center avenue, are daily shifted over this crossing. The Butler Passenger Railway Company, or its successor, the Pittsburgh and Butler Passenger Railway Company, has tracks in the streets in both parts of the borough, but has no tracks on Center avenue which cross the railroads or the creek.

At an election held November 17, 1911, the electors of the Borough of Butler authorized the municipal authorities to increase its indebtedness in the sum of \$90,000.00 for the purpose of constructing an elevated street or highway from the end of East Wayne street at McKean street, an extension of Center avenue on the north side of the creek, to Fairview avenue on the south side of the creek, and along Fairview avenue to Center avenue. Thereupon the municipal authorities by ordinance enacted June 4, 1912, ordained the opening of a public street from the eastern end of East Wayne street in the Borough of Butler to a point on Fairview avenue, north of Center avenue, of the width of forty-five feet, including footways, to cross the rights of way of the above-mentioned railroads, and to be an elevated public street having a clearance "of at least twenty-seven feet over the rails of the Pittsburgh, Bessemer and Lake Erie Railroad, and at least twenty-two feet over the rails of the Pittsburgh and Western Railroad" and "to be supported on pedestals set in pairs."

The petition of the Borough of Butler set forth the above facts *inter alia*, and alleged that the proposed structure was in accordance with a survey of the borough engineer and plans submitted to the Commission, that the estimated cost of the entire improvement, exclusive of damages to private property, is \$89,914.50, that

the damages to private property will not be in excess of \$10,000.00, that the borough had been unable to come to an agreement with the railroad companies and the street railway company affected, and that "the proposed highway is necessary for the accommodation of the public, and will provide a safe, easy and convenient means of travel between the two parts of the borough, and will practically eliminate all of the travel over the railroad grade crossings on Center avenue, excepting vehicle travel to and from the Baltimore and Ohio freight depot.

The petition then prayed the Commission to issue a Certificate of Public Convenience for the proposed highway, to approve the route, plans, and form of construction not to exceed fifty feet in width, to approve the provision of the ordinance providing the terms and manner in which a street railway or trolley company may cross and use the highway, and to decree that one-half of the cost of the structure be paid by the railroads.

The Pittsburgh and Western, the Baltimore and Ohio, the Pittsburgh, Bessemer and Lake Erie and the Bessemer and Lake Erie Railroad Companies made answer, setting forth *inter alia* that there were several other better and less injurious locations for said viaduct, that the proportion of cost they were asked to pay is unjust and unreasonable, that inasmuch as no grade crossing is abolished over said railroads or any of them, and only an additional burden is imposed, they should not be required to contribute anything, that the County of Butler should be made a party and be required to contribute, and that the petition is incomplete and defective.

The Butler Passenger Railway Company made answer setting forth in substance that it already had the right by ordinance to occupy any street or highway, that the limitations in the ordinance to be imposed on it are illegal, and that the payments required by the ordinance to be paid by it are unreasonable.

The Borough of Butler subsequently filed an amendment to its petition, asking leave to make the County of Butler a party respondent, to which the county filed an answer denying the right of the borough to require it to become a party to the proceeding.

The Commission, in an effort to reach a correct solution of what is conceded to be a difficult and complicated situation, held



three hearings, at no one of which did any of the respondents present testimony. It sent its engineer to the Borough of Butler, and he made to it an elaborate written report. Two members of the Commission went to Butler and made a personal examination of the situation.

The town of Butler is built upon rather high hills, and is divided into two parts by the creek running through a narrow valley, along which are the railroad tracks. The crossing at Center avenue is a dangerous and much obstructed grade crossing, so much so, that the Butler Passenger Railway Company has never laid tracks to run between the two parts of the town.

The proposed elevated structure is an attempt after years of effort and consultation to solve the difficulty. As shown by the plans filed with the Commission, it will be laid out approximately parallel with Center avenue from a point in McKean street, a continuation of Center avenue in the north part of the town, to a point on Center avenue in the south part of the town. Where it crosses the railroads at an elevation, it will be about one hundred and fifty feet east of Center avenue.

Some light upon the value of the proposition is given by the conduct of the parties. The Pittsburgh and Western Railroad Company and the Baltimore and Ohio Railroad Company operating the Pittsburgh and Western Railroad, filed a bill in equity in the Court of Common Pleas of Butler County to restrain the proposed construction, and the court refused the injunction asked. The Supreme Court on appeal, affirmed the decree. [See Pittsburgh and Western R. R. Co. v. Butler Borough, 242 Pa. 461.]

The Pittsburgh, Bessemer and Lake Erie Railroad Company and the Bessemer and Lake Erie Railroad Company, after having filed an answer to the petition of the Borough of Butler, came before the Commission with a subsequent petition, in which they say that "after investigating the Butler situation and having due regard for the interests of the Borough of Butler and of your petitioners, and after giving due consideration and study to the problems presented, and having in mind a comprehensive plan for taking care of the other crossings in said borough, are of the opinion that the elevated street which the Borough of Butler proposes to construct and for which it now asks this Commission to issue a

Certificate of Public Convenience is the best solution of the situation, and is one step in a comprehensive plan for eliminating the grade crossings in the Borough of Butler."

Counsel for the Butler Passenger Railway Company, at the hearing agreed that the company would not take any advantage of its right, should such right exist, to cross the structure by virtue of preceding ordinances, and said, "we are willing to submit ourselves to the Commission on the sole question as to the proportion of the cost of the structure which is to be placed on our company."

It is true that the proposed construction does not do away entirely with the grade crossing at Center avenue, but it is averred in the petition of the borough and not denied, that this crossing will be practically eliminated. The testimony was that "it would take practically all of the pedestrian travel away from Center avenue and take it over this structure, and it would take a great percentage of the freight traffic from crossing the Bessemer." And again: "It would practically eliminate almost all the travel on Center avenue with the exception of those going down to the Bessemer depot, because the others would all go over the viaduct."

The proposed construction, should it be carried into effect, will be of great benefit to the citizens of the borough, since it will furnish them with a means of access and transportation between the two parts of the town without the necessity of crossing the railroads at grade. It will be of benefit to the Butler Passenger Railway Company, for the reason that it will enable that company to connect its now several tracks, and must increase its opportunity to furnish facilities for the traveling public. It will be of great benefit to the railroads, because to a large extent the dangers, inconveniences, and liability to damages existing at the grade crossing at Center avenue, the main avenue of the town, will be removed.

An effectual means of eliminating all of the grade crossings in Butler would be to require the railroads to elevate all of their tracks. When this suggestion was made by the Commission at the hearing, it was vigorously opposed by counsel for the railroads upon the grounds that the enormous expense to them would make

the plan practically impossible. The topography of the ground at this place is such, that the elevation of the tracks would require a long distance. The cost, it was estimated, would be over \$2,000,000.00.

After giving careful consideration to the whole subject and duly weighing the advantages and disadvantages, it is the opinion of the Commission that the plans and specifications for the construction of the viaduct ought to be approved, and the Certificate of Public Convenience ought to be issued, and that the Borough of Butler proceed with and complete the work in accordance with the plans and specifications.

The Act of July 26, 1913, provides in Article V, Section 12, that the Commission shall have exclusive power "to order any crossing aforesaid, now existing or hereafter constructed at grade, or at the same or different levels, to be relocated or altered, or to be abolished, according to plans and specifications to be approved, and upon just and reasonable terms and conditions to be prescribed by the Commission."

It further provides in another paragraph of the same section, "The expense of the said construction, relocation, alteration, or abolition of any such crossing, shall be borne and paid, as hereinafter provided, by the public service company or companies or municipal corporations concerned, or by the Commonwealth, either severally or in such proper proportions as the Commission may, after due notice and hearing, in due course, determine, unless the said proportions are mutually agreed upon and paid by those interested as aforesaid."

In the present case, the parties as appears from the record, have been unable to agree upon their respective proportions of the expense. The Commission gave to them due notice and held three hearings, offering to them and each of them the opportunity to present what they might consider to be important for their interest and welfare in respect to this and the other features of the case. It therefore, under the statute, becomes the duty of the Commission to determine this question of expense.

The Commission has failed to find any sufficient ground upon which the County of Butler could be required to pay any part of such expense, and as to the county, the case is dismissed.

It is the opinion of the Commission that the expenses consisting of the cost of construction, the damages, if any, that may be awarded to adjacent property owners, and all other necessary expenses, if there be any, ought to be borne and paid in the following proportions, to wit:

Thirty (30%) per cent. to be paid by the Borough of Butler.

Thirty (30%) per cent. to be paid by the Pittsburgh and Western Railroad Company, and the Baltimore and Ohio Railroad Company, jointly or severally.

Thirty (30%) per cent. to be paid by the Pittsburgh, Bessemer and Lake Erie Railroad Company, and the Bessemer and Lake Erie Railroad Company, jointly or severally.

Ten (10%) per cent. to be paid by the Butler Passenger Railway Company, or its successor, the Pittsburgh and Butler Passenger Railway Company: Provided, however, that this ten (10%) per cent. may be settled upon the basis of tolls to be paid by the Butler Passenger Railway Company to the Borough of Butler, upon such terms as shall be mutually satisfactory to them, should the borough and the railway company be able to make such an agreement.

SAMUEL W. PENNYPACKER.

#### ORDER.

This case being at issue upon petition and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

*Now, to wit, June 16, 1914, It is ordered; That the Borough*

of *Butler* proceed with and complete the work of constructing a viaduct in the said borough, over the tracks of the Baltimore and Ohio Railroad Company and the tracks of the Bessemer and Lake Erie Railroad Company, in accordance with the plans and specifications filed with the Commission, and referred to in the above report;

That the expenses of said construction, consisting of the cost of construction, the damages, if any, that may be awarded to adjacent property owners, and all other necessary expenses, if there be any, be borne and paid in the following proportions, to wit:

Thirty (30%) per cent. to be paid by the Borough of Butler.

Thirty (30%) per cent. to be paid by the Pittsburgh and Western Railroad Company, and the Baltimore and Ohio Railroad Company, jointly or severally.

Thirty (30%) per cent. to be paid by the Pittsburgh, Bessemer and Lake Erie Railroad Company, and the Bessemer and Lake Erie Railroad Company, jointly or severally.

Ten (10%) per cent. to be paid by the Butler Passenger Railway Company, or its successor, the Pittsburgh and Butler Passenger Railway Company: Provided, however, that this ten (10%) per cent. may be settled upon the basis of tolls to be paid by the Butler Passenger Railway Company to the Borough of Butler, upon such terms as shall be mutually satisfactory to them, should the borough and the railway company be able to make such an arrangement.

That a Certificate of Public Convenience issue in accordance with this order.

By the Commission,

F. M. WALLACE, *Acting Chairman.*

PENNSYLVANIA UTILITIES CO. v. LEEHIGH NAVIGATION  
ELECTRIC CO.

*Approval of Commission—Corporation chartered prior to approval of Public Service Company Law—Act of July 26, 1913, Art. III, Sec. 12, Art. III, Sec. 2, (a), (b).*

The complainant company had been engaged for many years in supplying light, heat and power by electricity, to certain townships, boroughs and cities. The respondent company, though incorporated prior to the approval of the Public Service Company Law, had not begun the exercise of its rights and powers. Since the said act went into effect, however, the respondent has begun the exercise of rights and powers under its charter, and, in so doing, has invaded the territory occupied and served by the complainant company, against which invasion the complainant protests and asks the Commission to restrain such invasion.

*Held:* 1. The Commission has no authority to require a company chartered prior to the approval of the Public Service Company Law to secure its approval before beginning the exercise of rights and powers under its charter.

2. In Art. III, Sec. 2 of the said act, paragraph (a) refers to the incorporation of chartered companies, and paragraph (b) refers to "persons" engaged for profit in furnishing public service, as that term is defined in Art. I, Sec. 1.

COMPLAINT DOCKET No. 200.

Report and Opinion of the Commission.

Submitted April 29, 1914.

Decided July 9, 1914.

*J. R. Geyer and E. E. Beidleman*, for Complainant.

*W. U. Hensel and Wm. J. Turner*, for Respondent.

COMMISSIONER PENNYPACKER:

The petition of the complainant sets forth that it is a corporation duly incorporated under the laws of Pennsylvania, having the right, by its charter, and by purchases of and mergers with other corporations "to supply light, heat and power, or either of them, by electricity" to certain townships of Pike, Monroe, and Northampton Counties, and to the Boroughs of Stroudsburg, East Stroudsburg, Bangor, East Bangor, Pen Argyl, Wind Gap, Bath, Nazareth, Glendon, Portland and the City of Easton; that it has been furnishing electric light and power to these municipalities

for periods running from three to twenty years; that its system of distribution and local supply are sufficient to provide service of the territory so occupied by it; that the respondent, the Lehigh Navigation Electric Company, was formed by the merger of certain electric companies, and, by its charter, approved January 6, 1913, was authorized to do business in, *inter alia*, certain townships of Monroe and Northampton Counties; that it has, apart from securing its chartered rights, done nothing in these two counties; that the respondent, since July 26, 1913, "has proceeded to invade the territory thus occupied and served by your petitioner;" that the territory covered by petitioner's corporate franchise "is now occupied by it with electric plants representing a large investment; that it is prepared and ready to serve the entire community, and to serve at as low a rate as can be furnished by any one consistent with a proper service, and that the respondent "is about to invade the said territory for the purpose of carrying on a ruinous competition which will result in no benefit to the public or to those financially interested."

The petition set out twelve instances of negotiations, or attempted negotiations, by the respondent, with municipalities and individuals within the territory described. It averred that the respondent "is thus seeking, attempting and intending to enter the territory thus controlled and served by your petitioner; that this is not necessary for the public convenience or necessity, nor for the proper and efficient serving of the public," and that the respondent, prior to the passage of the Act of July 26, 1913, had no right in the premises, other than accrued to it by virtue of having obtained charters and "had not begun to exercise any of its rights, powers, franchises or privileges."

The petition prays the Commission to "order, decree and direct that the said defendant refrain from invading or attempting to invade the territory already occupied and served by your petitioner, and from disturbing and attempting to disturb the business relations already existing or about to be created between the members of the public of that district and your petitioner and to cease and withdraw all operations in your petitioner's district."

In its answer filed, the respondent, *inter alia*, "demurs to the

whole of said petition and for cause of demurrer shows—(a) That upon the face of said petition the petitioner is not entitled to the relief claimed; (b) That this Commission has no jurisdiction, under the provisions of the act approved July 26, 1913, to grant the relief claimed by the petitioner.”

The question which is raised by the averments of the petition and the answer in the nature of a demurrer, may be stated as follows: Has the Commission authority to prevent a corporation which is a public service company, incorporated before the passage of the Act of July 26, 1913, but which has not begun the exercise of its rights, from entering upon the territory prescribed by its charter, because of the fact that this territory is already occupied by another public service company rendering adequate service?

It is plain that if this question be answered in the affirmative, and the authority so conferred be exercised by the Commission, the result is a complete nullification of the charter of the respondent. If an electric light company cannot enter upon the territory in which it has been granted power by the legislature to exercise its franchises and privileges, it can do nothing. It is frankly conceded that there is no specific grant of such authority to the Commission to be found in the language of the act. Since the act went into effect, public service companies can only be incorporated, upon the determination of the Commission, that the approval of the application is “necessary or proper for the service, accommodation, convenience or safety of the public.” When a public service company, acting within the rights granted by its charter, undertakes to make a contract with a municipality, the subject matter of the contract is still within the control of the Commission. The act provides that “No contract or agreement between any public service company and any municipal corporation shall be valid unless approved by the Commission.” This provision seems plainly to apply, no matter at what time the public service company may have been incorporated, but there is no provision of the act which goes so far as to empower the Commission, in specific language, to exclude a public service company incorporated prior to the going into effect of the act, from entering upon



the territory to which its franchises apply. It may want to supply individuals within that territory. It may with the consent of the Commission, supply municipalities there. There is, on the other hand, a specific provision bearing upon the subject which seems to deny such authority. Section 12 of Article III provides:

"Every public service company shall be entitled to the full enjoyment and exercise of all and every the rights, powers and privileges which it lawfully possesses or might possess at the time of the passage of this act, except as herein otherwise expressly provided."

It was argued, however, with much vigor, that Section 2 of Article III does give necessary authority. This section provides as follows:

"Upon the approval of the Commission, evidenced by its Certificate of Public Convenience first had and obtained, and not otherwise, it shall be lawful for any proposed public service company—(a) To be incorporated, organized or created, \* \* \*;" "(b) To begin the exercise of any right, power, franchise or privilege, under any ordinance, municipal contract or otherwise."

The contention is that since the respondent had only been chartered and had not begun to exercise any of its powers before the act went into effect, it is not now entitled to begin such exercise without the approval and certificate of the Commission. To give such a construction to the paragraph would be to bring it into conflict with Section 12 of the same article heretofore cited. The whole act must be considered and such part of it be given its due weight, in order that a consistent construction be reached, if it be at all possible, from the language used. It is entirely possible to give full weight to the words of this paragraph without being compelled to reach the conclusion contended for by the complainant.

Under Section 1 of Article I of the act, public service companies consist of two classes, i. e., corporations and "all persons engaged for profit in the same kind of business."

Paragraph "a" of the section under consideration applies only to the incorporation, organization and creation of chartered com-

panies. It therefore became necessary to add a paragraph to cover the other class of public service companies, consisting of persons engaged for profit in the same kind of business. This appears to have been the purpose of paragraph "b." Such an interpretation harmonizes all of the related sections of the act, and is strengthened by the use of the word "proposed." This descriptive word cannot be applied to a corporation in existence with all of its powers and franchises before the passage of the act. It fits exactly the case of a combination of persons, or an individual intending to engage for profit in that kind of business, but who do not become a public service company until they begin the exercise of the rights conferred upon them.

For these reasons, it is the opinion of the Commission that it has no authority to prevent the respondent from entering upon the territory described in its charter, and that, assuming the facts alleged in the petition of the complainant to be true, the complaint ought to be dismissed.

#### ORDER.

This case being at issue, upon petition and answer on file, which answer, *inter alia*, sets up the want of power and authority in the Commission to grant the relief prayed for, and the case having been duly heard and submitted by the parties, and the Commission having, on the date hereof, made and filed of record a report containing its conclusion upon the aforesaid question of law, which said report is hereby referred to and made a part hereof:

Now, to wit, July 9, 1914, *It is ordered:* That the prayer of said petition be refused, and that the said petition be and the same is hereby dismissed.

By the Commission,

FRANK M. WALLACE, *Acting Chairman.*

**THOMAS C. BALDRIDGE v. MCKEESPORT & DUQUESNE BRIDGE Co.***Reasonable rates—Fair return on investment.*

The respondent bridge company, having in twenty-three years of operation earned less than three per cent. per annum on the value of the property employed in public use, having never paid a dividend, and charging tolls less than the rates allowed by statute, it was

*Held:* That a complaint of excessive rates should be dismissed.

No. 165.

Report and Opinion of the Commission.

Submitted March 12, 1914.

Decided June 19, 1914.

*Edward B. Vale*, for complainant.

*D. I. McCahill* and *W. E. Crow*, for Respondent.

COMMISSIONER PENNYPACKER:

It appearing that the bridge of the McKeesport and Duquesne Bridge Company, the respondent, was erected in 1891, twenty-three years ago; that its present value is not less than \$175,000.00, exclusive of real estate by testimony valued at about \$18,000.00; that its entire net earnings during that whole intervening period amount to \$48,099.00, being less than three per cent. per annum upon the value of the bridge; that it has never paid a dividend to its stockholders; that for one year it was in the hands of a receiver; that it has a bonded indebtedness of \$150,000.00; that the tolls charged as to all vehicles except automobiles, are less than those permitted by statute and an order of the court of quarter sessions, and that the testimony as to the reasonableness of the tolls charged for automobiles is conflicting; it is the opinion of the Commission that the complaint has not been sustained and ought to be dismissed.

ORDER.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been

had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

*Now, to wit, June 19, 1914, It is ordered:* That the complaint in this proceeding be and it is hereby dismissed.

By the Commission,  
F. M. WALLACE, *Acting Chairman.*

ELIAS SASSAMAN v. LEHIGH VALLEY TRANSIT CO.

*Rates of interurban street railway—Discrimination.*

Local conditions must always be considered in making schedule of rates on lines of a transportation plant. The size of cars, the frequency of service, the density of population of adjacent territory, the grades and general alignment of the road-bed, the annual outlay for repairs and upkeep on the different lines, all figure in the problem of rate-making.

Rates between Coopersburg and Allentown on line of the Lehigh Valley Transit Company prescribed.

No. 130.

Report and Opinion of the Commission.

Submitted Jan. 19, 1914.

Decided April 21, 1914.

*D. Hayes Keech*, for Complainant.

*Reuben J. Buts*, for Respondent.

COMMISSIONER BRECHT:

In the matter of the complaint of Elias Sassaman v. The Lehigh Valley Transit Company, the complainant petitions for a lower rate of fare from Coopersburg to Allentown than the rate now in effect, alleging that the fare collected at present is discriminatory as compared with the rates charged from other points, similarly situated on the lines of the respondent.

Coopersburg is a small town located nine miles from Allentown on the trolley line that extends from the latter place to Philadelphia. This branch of railway is an interurban line and forms a part of a more less extensive trolley system radiating from Allentown as a general center, and operated by the Lehigh Valley Transit Company.

The regular rate of fare from Coopersburg to the city of Allentown is fifteen cents, but a return ticket can be purchased at the office of the company at Coopersburg or Allentown for twenty-five cents, thus making the fare each way twelve and a half cents, or a trifle less than one and four-tenths cents per mile.

These return tickets have no time limit specified on them and must not be used on the day when purchased, but will be accepted for transportation upon any day of the year without any restriction as to the time, whatsoever. The purchaser, therefore, has the privilege, if he chooses to take advantage of it, of buying one or any number of these tickets at any given time, and is not obliged to call daily at the ticket office to pay his fare for transportation. Moreover, the ticket may be bought by one party and used by another, the ticket being accepted by the carrier from anyone that presents it.

The regular one-way fare of fifteen cents which must be paid on the car, and the daily return ticket which can be obtained only at the company's office at either end of the trip, are the only rates of fare established by respondent between Coopersburg and Allentown.

The complainant avers that respondent issues a monthly commutation fare from other points on its lines about the same distance from Allentown at a much lower rate, and therefore contends that he is discriminated against, and petitions that he be granted the lower commutation rate accorded to the citizens of the aforesaid towns and places located on other divisions of the Transit Company's system.

While respondent admitted that there are certain towns and places on other branches of its system, located about the same distance from Allentown as Coopersburg that have a lower rate of fare, it also established the fact in the testimony offered that there are other towns and localities on the Coopersburg line situated about the same distance from Philadelphia, Norristown and other centers of population as Coopersburg is from Allentown that have a higher rate of fare than the people of Coopersburg.

From the various facts and administrative features educed at the hearing, it appeared quite conclusively that existing local conditions are always a factor which must be considered in the work

of arranging a correct schedule of rates on the different lines of a transportation plant. The size of the cars operated on a line, the frequency of the service furnished, the density of the population of the adjacent territory, the grades and general alignment of the road-bed, the annual outlay required for repairs and up-keep on the different branch lines all figure more or less in the rate problem, and must be considered up to a certain point in their proportionate bearing upon the matter.

Since the hearing held in this proceeding, the respondent company, with a view of meeting the wishes of the complainant in part, and of maintaining thereby a spirit of harmony and co-operation between the Transit Company and its patrons, has written to the Commission that it is willing "to issue commutation tickets for travel between Coopersburg and Allentown at the rate of twenty-five cents for a round trip, and between Centre Valley and Allentown at the rate of sixteen cents for a round trip, such tickets, in each case, to be bound into books containing twenty-five round trips and to be good for use only on local cars and during the calendar months within which the same were issued, but only when presented by the purchasers in person, accompanied by the book themselves."

This proposed change in the rate of fare has been submitted to the complainant by the Commission for comment. In his answer to the foregoing readjustment of rates, the complainant contends that the charge of discrimination preferred in the complaint is not removed and asks for a still further reduction in the rates. He requests that he be permitted to purchase for two dollars and seventy cents (\$2.70) "a monthly book containing twenty-five round trip tickets with full transfer privileges within the corporate limits of the city of Allentown," and for three dollars (\$3.00) "a book containing twenty-seven round trip tickets with transfer privileges, between Allentown and Coopersburg, good for at least one calendar month;" and that he be permitted to ride between Allentown and Center Valley on either of two commutation books containing twenty-five and twenty-seven round trip tickets respectively which can be obtained at the rate of ten cents for one round trip.

It therefore appears that the proposed rates are not satisfactory to the complainant, and the Transit Company as intimated in its letter submitting the proposed reduction does not feel warranted to offer any further concessions in the matter. The Commission accordingly has made a careful examination of the various local conditions affecting the point at issue, and also of the general principles that must be recognized in the problem of rate-making when the transportation service of a general trolley system is purely local on some lines and interurban and less frequent on other divisions. After a full consideration of all the different phases and factors involved in the matter, the Commission hereby issues the following order:

ORDER.

AND NOW, to wit, April 21, 1914, it is hereby ordered:

(1) That the number and extent of the fare zones between Coopersburg and Allentown remain the same as heretofore.

(2) That the single return ticket for twenty-five cents issued at the office of the Transit Company at Coopersburg and Allentown continue in effect in the same manner and form as heretofore.

(3) That a commutation ticket book containing twenty-five (25) round trip tickets, good for the calendar month for which it is purchased, be issued as follows:

(a) Good between Coopersburg and Allentown, with full transfer privileges within the corporate limits of the city of Allentown, for four dollars and fifty cents (\$4.50), thus making it at the rate of eighteen cents (18c) a round trip.

(b) Good between Center Valley and Allentown, with full transfer privileges within the corporate limits of the city of Allentown, for three dollars and seventy-five cents (\$3.75), being at the rate of fifteen cents (15c) a round trip.

(4) That upon compliance with the order this case be marked closed.

By the Commission,

FRANK M. WALLACE, *Acting Chairman.*

## WILLIAM G. BLOUGH V. BALTIMORE &amp; OHIO R. R. Co.

*Discrimination in furnishing service.*

The respondent railroad company, operating a six-mile branch line from Holsopple to Jerome, Pa., for the use of one consignee, refused to establish a station at that point and to serve others in that vicinity, contending that the amount of business to be secured would not justify it.

*Held:* That the respondent should build a public siding and establish a non-agency station for the use other consignees and shippers.

FILE NO. 1100.

## Report and Opinion of the Commission.

Submitted July 24, 1913.

Decided June 18, 1914.

*W. David Lloyd*, for Complainant.*William B. Linn*, for Respondent.

## COMMISSIONER WALLACE:

On July 24, 1913, William G. Blough, a resident of Jerome, Somerset County, complained to the Pennsylvania State Railroad Commission that the Baltimore and Ohio Railroad Company refused to carry freight consigned to him and other persons at Jerome, a point on a branch line of said railroad, about six miles from Holsopple, in Somerset County, and that said railroad discriminated against the merchants doing business in Jerome, and prayed the Railroad Commission to grant relief from this alleged discrimination.

Negotiations were carried on between the complainant and the Commission and the railroad company for some time, and the matter was undetermined when the Public Service Company Law became operative.

The complaint was then set down for hearing on the informal complaint submitted by Mr. Blough and the answer made by the Baltimore and Ohio Railroad Company, and three hearings were held by the Commission, and an investigation made by its representative on the grounds.

The undisputed facts in the case are that Jerome is a mining community of some 2,000 persons, located at the end of a branch



of the Baltimore and Ohio Railroad Company, which branch leaves the main line at Holsopple; that it has been the practice of the railroad company to refuse to deliver freight consigned to Jerome at Jerome, making it necessary for the consignee to haul the same from Holsopple overland. The company based this refusal on the ground that the amount of freight consigned to Jerome and the amount moving from Jerome was so small that it would be unprofitable to establish a station at that point.

After the very careful investigation referred to, the Commission is of the opinion that inasmuch as the Baltimore and Ohio Railroad Company delivers freight at Jerome, consigned to the Penn Mercantile Company, it should afford other consignees and shippers the same opportunities that it furnishes the Penn Mercantile Company, and it therefore recommends that the Baltimore and Ohio Railroad Company construct and maintain a side track, at a convenient place, for the use of patrons in the town of Jerome. In considering the location of this side track, the testimony showed that it could be located at the east of the switches of the Jenner-Quemahoning Coal Company, and accommodate more of the prospective users than at any other point, the general location selected being approximately 1,000 feet from the places of business of a large majority of the users of the railroad.

The Commission therefore directs that the siding to be constructed shall be located at a point to be selected by the Baltimore and Ohio Railroad Company, within a certain tract of land marked on a blue print offered in evidence, and known as Exhibit 1-G, 27-A, and that said siding shall be capable of accommodating six cars, and that at this siding the railroad company shall erect a freight station, of the type generally erected by said company at its non-agency stations, and that an order to this effect be drawn.

#### ORDER.

This case being at issue, upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions

thereon, which said report is hereby referred to and made a part hereof:

*Now, to wit, June 18, 1914, It is ordered:* That the Baltimore and Ohio Railroad Company construct a side track, capable of accommodating six cars, and a freight station in connection therewith, of the type suitable for non-agency stations, at some point on the north side of the right of way of the Jerome Branch of said railroad, and within the following described tract of land: Beginning at a point marked on Exhibit No. 1-G, 27-A, filed in this case as point 181/23.2; thence along the northern line of said right of way in a westerly direction a distance of 1,300 feet, more or less; thence in a northerly direction to the southern line of a road, marked on said exhibit as "Public Road;" thence along said road in a southeasterly direction 1,350 feet, more or less, to a point; and thence in a southerly direction to the place of beginning.

That said railroad company establish at said place a station for the handling of freight, of the type known as non-agency station.

By the Commission,

F. M. WALLACE, *Acting Chairman.*

PITTSBURGH STEEL CO. V. PITTSBURGH AND LAKE ERIE RAILROAD  
CO., ET AL.

*Joint rates—Apportionment of—Cancellation of.*

One of the respondents, after conference with complainant had fixed a joint rate on crude fluxing limestone from Union Furnace, Pa., to Monessen, Pa. Said joint rate was conceded to be reasonable. Subsequently, owing solely to a disagreement between the said respondent and another carrier participating in said joint rate, as to the proportion which each was to receive, the said rate was cancelled.

*Held:* The cancellation of the joint rate, pending an apportionment thereof by the Commission, was unwarranted, and settlement should be made with the complainant upon the basis of the rate as if it had not been cancelled.

COMPLAINT DOCKET NO. 194.

Report and Order of the Commission.

Submitted March 10, 1914.

Decided August 5, 1914.

**COMMISSIONER TONE:**

The Pittsburgh Steel Company complained in this case of the withdrawal or cancellation by the Pennsylvania Railroad Company of the joint rate of 75 cents per ton of 2,240 pounds for the transportation of crude fluxing limestone from Union Furnace, Pa., and points adjacent thereto on the Pennsylvania Railroad, to Monessen, Pa., on the Pittsburgh and Lake Erie Railroad, by Supplement No. 5 to Pennsylvania Railroad Company's Tariff P. P., P. S. C. Pa., No. 2, resulting in the complainants being compelled to pay for the said transportation to which the said joint rate previously applied a combination of separate rates charged respectively by the Pennsylvania Railroad Company and the Pittsburgh and Lake Erie Railroad Company, between the points in question, which in amount was largely in excess of the joint rate cancelled.

At the hearing held by the Commission upon this specific complaint, which hearing was attended by the complainants and the Pennsylvania Railroad Company and the Pittsburgh and Lake Erie Railroad Company, respondents, the evidence submitted fully sustained the above allegations of the complaint. From this evidence it appeared that the said joint rate of 75 cents per ton was put into effect by the Pennsylvania Railroad Company after negotiations with the complainant, and the respondents conceded that it was a reasonable joint rate. It further appeared that the joint rate so established was afterwards cancelled by the Pennsylvania Railroad Company solely by reason of the fact that it and the other participating carrier, viz., the Pittsburgh and Lake Erie Railroad Company, had failed to agree as to the proper division of the joint rate that should be made between them. A large amount of testimony was presented by the two respondent carriers relative to this controversy over the division which had arisen between them, and it was submitted to the Commission as the basis upon which the Commission might, under the provisions of the Public Service Company Law, determine what the equitable and proper adjustment of the division of the joint rate, as between said respondents, ought to be. The respondents offered no testimony, however, to justify the cancellation of the joint rate

and the resultant increase in the charge for the transportation to the complainant occasioned thereby, other than the fact of said disagreement between the respondents. Provisions having been made by the statute for the settlement and adjustment by this Commission of such disagreement, it is the judgment of the Commission that, pending such determination, the cancellation of the concededly reasonable joint rate, to the detriment of the complainant, was not warranted, and that such joint rate should, accordingly, be forthwith restored, irrespective of the merits of the controversy as to the division of the same, and it will be so ordered—adjustment to be made with complainant upon the basis of said 75 cent rate as if it had not been cancelled.

After careful consideration of the testimony submitted by both respondents with regard to the fair, just and reasonable division of the said joint rate between themselves, it is the judgment of the Commission that the just and reasonable proportion to which the Pittsburgh and Lake Erie Railroad Company is entitled is 25 per cent., or 18¾ cents, and that to which the Pennsylvania Railroad Company is entitled is 75 per cent., or 56¾ cents, per ton of 2,240 pounds, and it will be so determined and ordered to take effect from the date of the establishment of the joint rate.

#### ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, submitted and filed of record a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

*Now, to wit, August 5, 1914, It is ordered:* That the joint rate of 75 cents per ton of 2,240 pounds for the transportation of crude fluxing limetone, in car loads, from Union Furnace, Pa., and points adjacent thereto on the Pennsylvania Railroad, to Monessen, Pa., on the Pittsburgh and Lake Erie Railroad, which were withdrawn by Supplement No. 5 to Pa. R. R. P. F., P. S. C. Pa. No. 2, effective April 1, 1914, be forthwith restored and put into full force and effect.

And it is further determined from the record in this case and hereby ordered, that the reasonable proportion of said joint rate to which the Pittsburgh and Lake Erie Railroad Company is entitled from the date said joint rate was originally made effective, is 25 per cent. thereof, or 18¾ cents, and that to which the Pennsylvania Railroad Company is entitled from said date is 75 per cent. thereof, or 56¾ cents, and that division of said joint rate shall be made by said companies from said date according to the proportion herein fixed and determined.

By the Commission,  
FRANK M. WALLACE, *Acting Chairman*.

EDWIN D. STOFFER V. CHAMBERSBURG, GREENCASTLE & WAYNESBORO STREET RAILWAY CO.

*Complaint not in proper form—Refusal of complainant to appear at hearing.*

Complaints were made in a series of letters to the Commission alleging inadequate service and excessive rates on lines of the respondent street railway company, but complainant refused to make affidavit thereto or to appear at the time and place set for hearing.

*Held:* Complaint should be dismissed.

No. 28.

Report and Order of the Commission.

Submitted Sept. 2, 1913.

Decided July 23, 1914

COMMISSIONER WRIGHT:

This complaint alleging excessive and discriminatory rate of fare and inadequate service between Greencastle and Waynesboro is in the form of letters written at different times by the complainant. The allegations contained in said letters are not verified by affidavit of the complainant, as required by the Public Service Company Law and Rules of Practice of the Commission. Copies of all said letters were sent to the respondent company for answer, which answer contained a detailed report of the number of passengers carried on the cars, the overcrowded condition of which is complained of, during the year 1913, and a statement with respect to the fare zones and rates charged by the company.

On February 26, 1914, a representative of the Commission made an investigation of the alleged crowded condition of the cars in question and filed his report under date of March 3, 1914. A hearing on this complaint was fixed for July 21, 1914, and the complainant and respondent advised of said hearing. Under date of July 15, 1914, the complainant replied to the Commission's notice of the said hearing as follows:

"I beg leave to state that I do not expect to be present either personally or by counsel at the hearing of the case on July 21st. \* \* \* I believe the ground has been thoroughly covered in my letters."

In view of the above facts that the allegations contained in the letters of the complainant are not verified by proper affidavit, the complainant refusing to make such affidavit, and his failure to appear at the hearing to substantiate by proper evidence the allegations contained in said letters, as well as the report of the investigator of the Commission, the Commission is of the opinion that the complaint should be dismissed and the respondent company advised by the secretary to use all possible care and diligence to prevent overcrowding of the cars in question.

#### ORDER.

The case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

*Now, to wit, July 23, 1914, It is ordered:* That the petition in this case be and is hereby dismissed and the secretary directed to advise the respondent company as determined in said report.

By the Commission,  
F. M. WALLACE, *Acting Chairman.*

*Regulations Governing the Granting of Power of Attorney and the Issuing of Concurrence in Tariffs of Rates and Fares of Common Carriers and Express Companies.*

TARIFF CIRCULAR NO. 1.

*The Public Service Company Law*, approved July 26, 1913, Article II, Section 1, (e) provides that tariffs or schedules of joint rates or fares need only be filed with the Commission by one of the companies—or its agents—and the other company or companies, with the consent and the approval of the Commission, need only file such evidence of concurrence therein or acceptance thereof as may be required by the Commission.

The following rules and regulations will govern the issuing of such concurrence, and power of attorney:

**Rule 1.**

The forms below prescribed must be on paper 8 by 10½ inches. The original and one copy must be filed with the Commission and a copy furnished to the carrier or agent in whose favor the instrument is issued.

**Rule 2.**

Such forms may either be printed or neatly typewritten.

**Rule 3.**

The following serial designations must invariably be used:

**FOR POWER OF ATTORNEY:**

Pa. E 1 No. (for express tariffs).

or

Pa. F 1 No. (for freight tariffs).

or

Pa. P 1 No. (for passenger tariffs).

**FOR CONCURRENCES:**

Pa. E 2 No. (for express tariffs).

or

Pa. F 2 No. (for freight tariffs).

or

Pa. P 2 No. (for passenger tariffs).

**Rule 4.**

The granting of authority to issue tariffs, under power

of attorney or concurrence, does not relieve the carrier or express company, conferring the authority, from the necessity of complying with the Public Service Company Law with respect to posting tariffs.

Tariffs issued under such authority must be posted by the carrier or express company conferring such authority.

**Rule 5.**

A concurrence may be revoked by filing with the Commission notice of revocation, in duplicate, and serving copy thereof upon the carrier or express company, to whom such concurrence was given, at least sixty (60) days in advance of the effective date shown on notice of revocation.

Corresponding revision of tariff or tariffs shall be made in the next supplement to or reissue thereof, and if necessary, supplement or reissue shall be made for the sole purpose of making such change lawfully effective on statutory notice upon the effective date stated in the notice of revocation.

**SPECIAL CONCURRENCE.**

**Rule 6.**

The following form must be used only in concurrence in rates or fares contained in tariffs filed with the Commission on or before July 1, 1914. Separate concurrence must be given for freight tariffs and passenger tariffs, and must apply to all the rates or fares contained in the tariffs of the carrier or express company to whom the concurrence is given (all tariffs intended to be covered being included in the concurrence as hereinafter required) and must not be modified except that the concurrence in freight tariffs may exclude coal and coke rates, for which separate concurrence may be given.

This form must be designated as "Special Concurrence" and must bear serial designation as provided in Rule 3 for concurrences.



Tariffs concurred in by means of this "Special Concurrence" need not be supplemented for the purpose of referring to the "Special Concurrence."

This form is designed to apply to all supplements including such as are issued after July 1, 1914, but to make it thus operate, carrier or express company must file with the "Special Concurrence" a list of the tariffs, arranged numerically, intended to be covered thereby, placing on the list only the tariffs of the carrier or express company to whom the concurrence is given.

.....

(Name of issuing carrier.)

.....191

# SPECIAL CONCURRENCE:

Pa. E 2 No. (for express tariffs).

or

Pa. F 2 No. (for freight tariffs).

or

Pa. P 2 No. (for passenger tariffs).

*To The Public Service Commission of the Commonwealth of Pennsylvania, Harrisburg, Pa.*

THIS IS TO CERTIFY, That.....assents

(Insert name of carrier or express company.)

to and concurs in the ..... tariffs and rate schedules and supplements thereto stated on the sheets attached hereto and made part hereof which the .....

(Insert name of carrier or express company.)

or its agent has, prior to July 1, 1914, filed with the Public Service Commission of the Commonwealth of Pennsylvania and which have not been cancelled and in which this company is shown as a participating carrier, and hereby makes itself a party to and bound thereby in so far as such schedule contains rates applying upon ..... via its line

(Here insert character of traffic.)

and to but not from points thereon; and this authority will continue as to any supplement to such schedule issued on and after July 1, 1914, but not to the re-issues of such schedules.

.....  
 (Insert name of carrier or express company.)  
 .....  
 (Name of officer.)  
 .....  
 (Title of officer.)

# POWER OF ATTORNEY FOR PUBLICATION OF TARIFFS.

## Rule 7.

The following form will be used as POWER OF ATTORNEY by the issuing carrier or express company in giving authority to *an individual* but not to another carrier or express company *to file for the issuing carrier tariffs or schedules as described.*

Such authority must not be given to an association or bureau, and it shall not contain authority to delegate to another the power to be conferred.

If two or more carriers or express companies execute this form containing the words "for if jointly with other carriers" in favor of a joint agent it will not be necessary for those carriers to exchange concurrences *with each other* as to the joint tariffs issued by that joint agent under such authority.

The same serial designation will be used as is provided in Rule 3.

.....  
 (Name of carrier or express company in full.)  
 Date ..... 191..

Pa. E I No. (for express tariffs).

or

Pa. F I No. (for freight tariffs).

or

Pa. P I No. (for passenger tariffs).

## KNOW ALL MEN BY THESE PRESENTS:

That the (Name of carrier or express company) has made, constituted and appointed, and by these presents does make, constitute, and appoint (Name of person appointed) its true and lawful attorney and agent for the said company and in its name, place, and stead (for it alone) and (for it jointly with other car-

riers), to file tariffs, classifications and exception sheets and supplements thereto, as required of common carriers by the Public Service Company Law and by regulations established by the Public Service Commission of the Commonwealth of Pennsylvania thereunder for the period of time, the traffic and the territory now herein named:

.....

.....

.....

And the said (Name of carrier or express company) does hereby give and grant unto its said attorney and agent full power and authority to do and perform all and every act and thing above specified as fully to all intents and purposes as if the same were done and performed by the said company, hereby ratifying and confirming all that its agent and attorney may lawfully do by virtue hereof, and assuming full responsibility for the acts and neglects of its said attorney and agent hereunder.

*In Witness Whereof*, the said company has caused these presents to be signed in its name by its.....president and to be duly attested under its corporate seal by its secretary, at..... in the state of....., on this.....day of....., in the year of our Lord nineteen hundred and .....

The (Name of carrier)

By .....

Its ..... President.

Attest:

.....,

Secretary.

(Corporate seal)

#### POWER OF ATTORNEY FOR CONCURRENCES.

##### Rule 8.

The following form will be used as **POWER OF ATTORNEY** to be given by common carriers or express companies to another common carrier or express company to give and accept concurrences.

Common carriers or express companies may confer upon other carriers or express companies the authority to

give and accept *concurrences for their account* by the use of the following form:

.....

(Name of carrier or express company in full.)

Date ..... 191..

Pa. E I No. (for express tariffs).

or

Pa. F I No. (for freight tariffs).

or

Pa. P I No. ( for passenger tariffs).

**KNOW ALL MEN BY THESE PRESENTS:**

That the (Name of carrier or express company) has made, constituted and appointed and by these presents does make, constitute, and appoint (Name of carrier or express company) its true and lawful attorney and agent for the said company and in its name, place and stead to give and accept concurrences in tariffs or schedules as required of common carriers (or express companies) by the Public Service Company Law and by regulations established by the Public Service Commission of the Commonwealth of Pennsylvania thereunder for the period of time, the traffic and the territory now herein named:

.....  
 .....  
 .....

And the said (Name of carrier or express company) does hereby give and grant unto its said attorney and agent full power and authority to do and perform all and every act and thing above specified as fully to all intents and purposes as if the same were done and performed by the said company, hereby ratifying and confirming all that its said agent and attorney may lawfully do by virtue hereof, and assuming full responsibility for the acts and neglects of its said attorney and agent hereunder.

*In Witness Whereof*, the said company has caused these presents to be signed in its name by its.....president and to be duly attested under its corporate seal by its secretary, at....., in the state of....., on this.....day of....., in the year of our Lord nineteen hundred and.....

The (Name of carrier)

By .....  
 Its ..... President.

Attest:

.....,  
 Secretary.

(Corporate Seal)

### CONTINUING CONCURRENCE.

#### Rule 9.

The following form will be used in concurring in rate or fare schedules published by common carriers, express companies or their duly appointed agents published and filed with the Commission on and subsequent to July 1, 1914.

.....  
 (Name of carrier or express company in full.)

Date ..... 191..

Pa. E 2 No. (for express tariffs).

or

Pa. F 2 No. (for freight tariffs).

or

Pa. P 2 No. (for passenger tariffs).

*To The Public Service Commission of the Commonwealth of Pennsylvania, Harrisburg, Pa.*

THIS IS TO CERTIFY, that (Name of carrier or express company) assents to and concurs in the publication and filing of any (express, freight or passenger) rate (or fare) schedule or supplements thereto which the (Name of carrier or express company) or its agent may make and file, and in which this company is shown as a participating carrier (or express company) and hereby makes itself a party to and bound thereby insofar as such schedule or supplements thereto contain rates (or fares) as described below:

.....  
 .....  
 .....

until this authority is revoked by formal and official notice of revocation placed in the hands of the Public Service Commission of

the Commonwealth of Pennsylvania and of the carrier (or express company) to which this concurrence is given.

.....  
 (Name of carrier or express company.)  
 By.....  
 (Name of officer.)  
 .....  
 (Title of officer.)

# TARIFF CIRCULAR NO 2.

## *In the Matter of Establishing Rates and Fares on Newly Constructed Lines.*

On Newly Constructed Lines of Road, including branches and extensions of existing roads, local rates and fares, and also joint rates and fares, may be established in the first instance to and from points on such new lines by posting tariffs, or supplements to tariffs, of such rates or fares issued by the carrier owning or operating such newly constructed lines or by joint agent acting for it under power of attorney, and filing the same with the Commission one day in advance of effective date. Such tariffs or supplements must bear notation that they apply to or from points on newly constructed lines to or from which no rates or fares from same points of origin or to same points of destination have applied by giving reference to this rule, immediately below the effective date, as follows:

"Issued under authority of Tariff Circular No. 2  
 of the Public Service Commission of the Commonwealth of Pennsylvania of June 17, 1914."

Tariffs or supplements to tariffs issued by other carriers establishing rates to or from or via such newly constructed line may be issued only upon statutory notice or special permission for shorter time. It will be the Commission's policy to grant such reasonable permissions as are necessary to give carriers and shippers fullest efficiency of such new lines.

.....  
 .....  
 .....  
 .....  
 .....

## ADMINISTRATIVE RULING No 3.

*In re transportation of railroad contractors, their men, materials and equipment.*

July 23, 1914.

BY THE COMMISSION:

The Commission has been requested in several communications from railroad companies of the Commonwealth, to express its opinion upon the question whether or not such carriers may lawfully transport contractors, their men, material and tools, equipment and supplies, in and about the performance of work being done by the contractor for such carrier, without charging and collecting tariff rates of compensation for such transportation, as in the ordinary case of transportation service being rendered to the public.

The question thus presented is a close one under the provision of the Public Service Company Law. The act provides in Section 1, sub-section (d) of Article II, that the rates or other compensation "for any service rendered or furnished" shall be set forth in the published tariffs of the company, and by Section 7 of Article III, it is made unlawful for any carrier, after January 1, 1914, to render or furnish any service of the kind or character rendered or furnished by it, except in accordance with such published tariffs.

Section 8 of the same article prohibits all unjust discrimination, as therein defined, as well as all undue or unreasonable preference. The Constitution of the Commonwealth prohibits the granting by any common carrier of any free passes, except to officers and employees of the carrier issuing such passes.

The Commission has given the subject careful consideration and as a result thereof has concluded not to construe the law as preventing a common carrier from according free or reduced rate transportation to a contractor, his men, materials, tools, equipments and supplies necessary to be transported by such contractor in the performance of the work being done for the carrier by the contractor, inasmuch as the contractor, under such circumstances, is to all practical intents and purposes, an employee of the carrier,

engaged in work for the carrier, and the transportation is, in substance and effect, transportation rendered by the carrier to itself.

A. B. MILLAR, *Secretary*.

ADMINISTRATIVE RULING No. 4.

*In re free transportation for charitable organizations.*

August 5, 1914.

The Commission has been requested to express its opinion upon the question whether a railroad company, or street railway company, or other transportation company, may lawfully grant free passes to charitable organizations.

As we have heretofore had occasion to point out in connection with similar questions relative to the subject of free transportation, the Constitution of the Commonwealth in Article XVII, Section 8, expressly provides that:

"No railroad, railway or other transportation company, shall grant free passes, or passes at a discount, to any person except officers or employees of the company."

So long as this prohibition remains as it now stands in the Constitution, the Commission is powerless to hold that free transportation may be issued to a charitable organization for charitable purposes, however much we might otherwise be in accord with a public policy which would permit of such free transportation in this class of cases.

A. B. MILLAR, *Secretary*.

CONFERENCE RULING No. 1.

July 23, 1914.

*In the matter of requiring published rates and fares to continue in effect for thirty days.*

The Public Service Company Law, approved July 26, 1913, Article II, Section 1, (f) provides in part as follows:



"To make no change in any tariff or schedule, which shall have been filed or published or posted by any public service company in compliance with the preceding sections, except after thirty days' notice to the Commission and to the public, posted and published in the manner, form and places required with respect to the original tariffs or schedules, which shall plainly state the exact changes proposed to be made in the tariffs or schedules *then in force*, and whether an increase or decrease, and the time when the proposed changes will go into effect;"

\* \* \*

The term "then in force" as employed in the paragraph above quoted must be interpreted as requiring that a tariff or schedule filed and posted must be allowed to become effective and remain in effect for at least thirty days before any change may be made therein, but this will not affect tariffs or schedules containing rates for excursions limited to certain designated periods under authority of General Order No. 4, of 21st day of January, 1914.

A. B. MILLAR, *Secretary*.

#### CONFERENCE RULING No 2.

July 23, 1914.

*In the matter of application of rates at intermediate points.*

The Public Service Company Law, approved July 26, 1913, Article III, Section 9 (a) provides:

"It shall be unlawful for any common carrier to charge or receive any greater compensation in the aggregate, for the conveyance of passengers or property of the same class for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance;" \* \* \*

As an assistance to carriers in compliance therewith and to facilitate the publication of tariffs, General Order No. 7 was issued, April 18, 1914, and provided:

(1) When tariffs are provided with suitable rule to govern the application of rates at intermediate

points, the same rates as are published in such tariffs from (or to) the next more distant point named in the tariff are made to apply from (or to) intermediate points; and

(2) Tariffs bearing on their title page, the notation prescribed in General Order No. 7, may be supplemented upon one day's notice to the Commission and the public, establishing thereby at intermediate points commodity rates which do not exceed those in effect from (or to) the next more distant point named in the tariff;

The Commission has this day made the following ruling:

The above rules will be applied to rates for movements wholly within the State of Pennsylvania both when the next more distant point named in the tariff is located in another state, and when the next more distant point, though in the State of Pennsylvania, is reached by an interstate line.

The rule and notation referred to in clauses (1) and (2) above may be placed upon tariffs on less than statutory notice.

A. B. MILLAR, *Secretary*.

#### GENERAL ORDER NO. 11.

(Superseding General Order No. 2.)

*In the matter of the regulation of the crossing of facilities of one Public Service Company by those of another Public Service Company.*

And now, August 5, 1914, until otherwise hereafter determined and ordered, any public service company, subject to the provisions of the Public Service Company Law, approved July 26, 1913, before constructing any structures or other facilities across the structures or other facilities of any other public service company, whether under ground, or above ground, or at the same or different levels, shall serve ten days' (or shorter notice, if specially allowed by the Commission, upon sufficient cause being shown,) written notice upon the public service company or companies whose structures it is so desired to cross, which notice shall specify the nature and character, way and manner, of such contemplated crossing, and the exact location thereof, and shall file with

the Commission a true copy of the notice so served, with proof of service thereof: Provided, however, that if an agreement which shall specify the nature and character, way and manner, of the construction of the proposed crossing be in force between the public service company proposing to cross and the public service company whose structures or facilities it is proposed to cross, it shall be sufficient if the above notice, served and filed, with proof of such service, with the Commission, as aforesaid, shall state the exact location of such crossing, and that the same will be constructed in accordance with said agreement and specifications referred to therein, a true copy of the said agreement and specifications being also filed with the Commission together with said notice.

The public service company or companies desiring to construct such crossing may, after the termination of the period of said notice, proceed therewith, in accordance with the specifications as stated or referred to in said notice, as above provided, unless, within the period of said notice, served as aforesaid, the public service company or companies affected by such crossing shall serve upon the company or companies proposing to make such crossing, and file with the Commission, a protest against the construction of the same, or unless, without such protest, the Commission, within the period of said notice, filed with it as aforesaid, shall, of its own motion, direct that the crossing shall not be proceeded with.

Such protest shall set forth the reasons which, in the judgment of the protestant, show that the Commission should not approve such crossing, and proof of service thereof, as aforesaid, shall be filed with the Commission within three days of the filing of the protest with the Commission.

The Commission, upon consideration of such notice or protest, or both, may fix a time and place for hearing, after due notice, and determine whether or not such crossing shall be approved. This regulation shall apply to all such crossings between the structures or facilities of any public service company and the structures or facilities of any other public service company, other than crossings between railroads and street railways, and shall be

subject to the specific regulations that may hereafter be adopted by the Commission.

This order supersedes General Order No. 2 upon the same subject.

By the Commission,

Aug. 5, 1914.

A. B. MILLAR, *Secretary*.

#### IN RE ORDERS FOR REPARATION.

The Commission, at its session, August 4, 1914, adopted a resolution to the effect that it will not consider or act upon claims for reparation on shipments that moved prior to January 1, 1914.

#### IN RE APPROVAL OF ERECTION OF MUNICIPAL WATER PLANT.

At its session of July 7, 1914, the Commission dismissed an application of one McDonald for the approval of the erection of a municipal water plant in a small borough in which there was no public service company engaged in supplying water. The application was presumably made in order to secure a more ready sale of the bonds to be issued to cover the cost of the plant. The Commission held that it has jurisdiction to approve such application only when the plant to be constructed will compete with a private company already engaged in service of the same kind or character in the same field.

## PUBLIC SERVICE COMMISSION.

### CITY OF PITTSBURGH'S PETITION.

*In re petition of the City of Pittsburgh for the approval of a street lighting contract with the Citizens' Electric Illuminating Company.*

*Municipal contracts—"Lowest responsible bidder"—Discretion of municipal authorities.*

The petitioning city, after due advertisement for and consideration of bids for street lighting, awarded the contract to the company previously supplying light for the city streets and having all necessary equipment and facilities for the execution of the contract. It asks the approval of the Commission for its contract made with the said company.

A competing company, which does not have the necessary facilities for the execution of the contract, and which will probably not be able to provide such facilities in less than four months, protests, alleging that its bid was lower than the one accepted by the city, and that the specifications set forth in the ordinance authorizing bids were discriminatory.

*Held:* 1. Whether the contract was awarded to the lowest responsible bidder, within the meaning of legislation relating to advertisement and competitive bidding upon municipal contracts, is purely a legal question for the courts rather than for the Commission.

2. Municipal authorities in the purchasing of supplies or awarding of contracts, are required by statute to follow certain general methods of procedure, but they are allowed to exercise reasonable discretionary powers in deciding upon the final actions to be taken.

3. In view of the fact that it would require four months or more for the protesting company to provide the facilities necessary for the execution of the contract, that whether light could be obtained during the interval was uncertain, that the difference in the amounts of the bids was small, the discretion vested in the council and the mayor was exercised in a reasonable manner.

MUNICIPAL CONTRACT DOCKET No. 103.

Report and Order of the Commission.

Submitted January 21, 1914.

Decided July 21, 1914.

*William N. Trinkle and Berne H. Evans, for the Commission.*

*Lyman D. Gilbert and Benjamin R. Jones, for the Citizens' Electric Illuminating Co.*

*Joseph P. O'Boyle*, for the City of Pittston.

*Robert W. Archbald, E. E. Beidleman, and W. L. Pace*, for Consumers' Electric Company.

COMMISSIONER TONE:

The city of Pittston, on January 10, 1914, filed a petition with The Public Service Commission, asking for the approval of a contract entered into December 31, 1913, with the Citizens' Electric Illuminating Company, for the lighting of the streets of Pittston, which petition states that in accordance with the provisions of an ordinance duly enacted by council December 8, 1913, and approved by the mayor December 11, 1913, proposals for said street lighting were duly advertised for, received, opened and acted upon by council, and the contract awarded to the Citizens' Electric Illuminating Company.

Following the presentation of said petition to the Commission, a protest against the issue of a Certificate of Public Convenience approving said contract, was filed by the Consumers' Electric Company of the city of Pittston, Luzerne County, Penna.

In this it was set up, \* \* \* that the said protestant is a corporation organized under the laws of the State of Pennsylvania, for the purposes of supplying and furnishing light, heat and power by means of electricity to the public in the city of Pittston; \* \* \* that the city of Pittston is a city of third class and subject to the provisions of the commission form of government law, approved June 27, 1913; \* \* \* that the contract for street lighting entered into December 31, 1913, by the city of Pittston with the Citizens' Electric Illuminating Company is based upon an ordinance and specifications which limited and confined the bidding to one type of lamp manufactured, owned and controlled by one company, and which ordinance discriminated arbitrarily and unreasonably in favor of the Citizens' Electric Illuminating Company, the only company at that time having a plant, poles and wires erected in said city, by providing on the eve of winter, that only four months' time be given the successful bidder to make the necessary installation; \* \* \* that the bids received for the street lighting per lamp per year for five and ten year terms respectively were as follows:

**Citizens' Electric Illuminating Company:**

For arc lamps, .....5 yr. term, \$55.00—10 yr. term, \$50.00

For incandescent or

tungsten lamps, ...5 yr. term, \$16.00—10 yr. term, \$15.00

**Pittston City Electric Company:**

For arc lamps, .....5 yr. term, \$57.00—10 yr. term, \$52.00

For incandescent or

tungsten lamps, ...5 yr. term, \$16.50—10 yr. term, \$15.50

**Consumers' Electric Company of Pittston:**

For arc lamps, .....5 yr. term, \$48.50—10 yr. term, \$46.50

For incandescent

lamps, .....5 yr. term, \$15.00—10 yr. term, \$14.75

For tungsten lamps, .5 yr. term, \$15.50—10 yr. term, \$15.00

\* \* \* that the Pittston City Electric Company is owned and controlled by the Citizens' Electric Illuminating Company, so that in reality there were but two bidders for said contract, and within a few minutes after said contract was awarded, it was executed by both the parties thereto; \* \* \* that the protestant was the lowest responsible bidder, complied with all the requirements in connection with submitting proposals, was and is ready and willing to furnish and provide the public lighting for said city on the terms and for the prices set forth in its bid, notwithstanding the unreasonable and discriminatory conditions attached to said ordinance and intended to favor the General Electric Company as to type of lamp, and the Citizens' Electric Illuminating Company as to the contract; \* \* \* that by reason of the short space of time provided in the specifications for the successful bidder to make the necessary installation, less bids were received than would have otherwise been submitted, and as a result the inhabitants and taxpayers of the city were deprived of the benefits of honest and fair competition favored by laws; \* \* \* that the awarding of the contract to the Citizens' Electric Illuminating Company at the prices set forth, imposed an additional pecuniary burden on the taxpayers of said city, is antagonistic to the best interests of the public, and unfair and unjust to the protestant, as a responsible competitive bidder for the contract; \* \* \* that the approval of said contract is not necessary or proper for the service, accommodation, convenience or safety of the public, and would be contrary

to the spirit of fair dealing and The Public Service Company Law ;  
\* \* \* that therefore the protestant objects to such approval, and asks that for the reasons given, the approval be withheld and refused.

The said ordinance of December 11, 1913, provided that the city clerk was authorized and directed to advertise for sealed proposals, in accordance with the ordinance and specifications, for a contract period of five and ten years; that the proposals should cover the entire lighting, naming separate prices for arc and incandescent lights; that all proposals be submitted to the city clerk in open council meeting at a time to be fixed by council; that the city reserves the right to reject any and all bids; that council may award the contract; that the mayor shall execute the contract, attested by the city clerk and the corporate seal of the city; that if the corporation awarded the contract is not in a position to immediately light the streets of the city, it is granted four months from the date of the contract becoming effective, to make the necessary installation.

The contract provides that the Citizens' Electric Illuminating Company, for a term of ten years from January 1, 1914, shall furnish for lighting the streets of the city, 126 arc lamps of a type known as Series Luminous or Magnetite operated in series on a four ampere circuit, and to be adjusted for four amperes with a voltage of approximately seventy-five to eighty and an average wattage of 310 at the terminals; of a type similar to and giving equally as good illumination as lamps now operated in Jenkins Township and West Pittston Borough, and located and suspended similarly to the present lamps; and also furnish 154 series 32 candle power tungsten lamps located and suspended similarly to the present lamps; and any additional arc or tungsten lamps required by the city; all lamps to be lighted all night and every night; that the city shall pay the company for said lighting at the rate of \$50.00 per lamp per year for arc lamps, and \$15.00 per lamp per year for tungsten lamps, less certain ratable deductions to be made whenever any lamp or lamps are not burning for certain times; that the company shall furnish current free of charge to the city, for lighting its city hall, city offices, stable and engine room of the fire department, and allow the city free use of poles



for the purpose of stringing wires for fire alarm and police service.

The evidence shows that in accordance with the ordinance of December 11, 1913, authorizing the same, the city clerk duly advertised for proposals for street lighting to be submitted to council on December 22, 1913. By reason of the fact that a bill in equity was then pending in the court of Luzerne County, praying an injunction to restrain the city from awarding the said contract, the bids were not opened until December 31, 1913, after said court had refused the injunction applied for in said case, and council then awarded the contract to the Citizens' Electric Illuminating Company, and the proper officers of the city executed the same.

The same council who represented one James A. Joyce, the complainant in the above-mentioned equity proceeding in which the injunction was refused, also represented the company protesting to this Commission against the issuing of the Certificate of Public Convenience approving the contract, which was awarded by the city of Pittston to the Citizens' Electric Illuminating Company. The grounds of the protest against our approving the contract are substantially the same as were urged upon the court for the granting of the injunction, and the testimony in support of the protest is also substantially the same, and all goes to the purely legal question as to whether the contract was awarded to the lowest responsible bidder within the meaning of legislation relating to advertisement and competitive bidding upon municipal contracts. That is a question rather for the courts than for the Commission to decide in connection with an application for a Certificate of Public Convenience, under The Public Service Company Law of July 26, 1913. In the decided case above mentioned, the court of Luzerne County has already passed upon such question, reaching a conclusion adverse to the contention of the present protestant in the case before us.

Conflicting testimony was given as to the relation between the Citizens' Electric Illuminating Company and the Pittston City Electric Company.

Conflicting testimony was also given as to the length of time required "to make necessary installation," which the specifications provided was to be four months, and the protestant stating that

it "was and is ready and willing to furnish and provide the public lighting for said city on the terms and for the prices set forth in its bid, notwithstanding the unreasonable and discriminatory conditions attached to said ordinance and intended to favor the General Electric Company as to type of lamp, and the said Citizens' Electric Illuminating Company as to the street lighting contract;" and yet at the hearing before the Commission the protestant introduced evidence to the effect that no "reasonable or sane man would undertake to erect a plant such as that contemplated in these specifications and contract inside of four months;" not "tie himself down to the contract;" nor "tackle it if he ever had any experience with doing it before."

Municipal authorities in the purchasing of supplies or awarding of contracts, are required by statute to follow certain general methods of procedure; and they are expected and allowed to reasonably exercise discretionary powers in deciding upon the final actions to be taken. When determining matters that require public notice, consideration in open regular meetings, and if competition be involved, the certainty of unsuccessful bidders calling attention to the actions taken, such municipal authorities will act only after giving due consideration to the many circumstances surrounding each case, and in their judgment for the best interests of the municipality.

Preliminary to awarding a contract for the lighting of the streets of Pittston, its council had to consider, \* \* \* the effect that the length of term of contract would have upon the price for lights; \* \* \* what type and distribution of lamp in its community would prove most satisfactory; \* \* \* what time should be fixed for receiving, opening and acting upon proposals; \* \* \* should any contract be awarded to a company without a plant in operation; if so, could light be secured and how, from date of the award of the contract until a new company be prepared to render service, and how long time should be fixed for the installation of a new plant; \* \* \* how much difference would be justifiable in prices between a company having an operating plant and a company without such a plant; \* \* \* and if a new company be awarded the contract, what advantages would result and what would be the probability of continued competition; \* \* \* etc.

The council of Pittston evidently considered the various phases of the question before it, as is shown by its ordinances and by the testimony at the hearing, and it is entitled to reasonable discretion in reaching its decision.

In the contract under consideration, the type of lamp specified will give satisfactory service, and is one of several types of modern lamps that are in general use and giving satisfactory service in many cities; the prices named are reasonable, although not the lowest of the proposals received; the service will be continuous; the proceedings of council were open and public, and we think that the discretion vested in council and mayor were exercised in a reasonable manner in awarding and executing the said contract.

Testimony was given that the Citizens' Electric Illuminating Company had been operating in Pittston since 1898; that there were never any complaints as to the character of the service rendered or the rates charged by it; that it had been furnishing current to light the streets for many years, and since the expiration of its last contract therefor in August, 1911, without any formal contract; that the specifications were prepared by K. J. Ross, president of the company now furnishing the light, and submitted by him to council; but no evidence was presented to show that the type of lamp specified by the city is improper or will not prove satisfactory.

It is therefore the opinion of the Commission that the approval of the contract is necessary and proper for the service, accommodation, convenience and safety of the public, and a Certificate of Public Convenience will issue accordingly.

#### ORDER.

This case being at issue upon petition and protest, on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, submitted and filed of record a report containing its findings of facts and conclusions, which said report is hereby referred to and made a part hereof.

*Now, to wit: July 21, 1914, it is ordered,* that a Certificate of Public Convenience be issued evidencing the Commission's approval of the contract between the city of Pittston and the Citi-

zens' Electric Illuminating Company for the lighting of the streets of said city for a period of ten years.

By the Commission,  
F. M. WALLACE, *Acting Chairman*.

APPLICATION OF THE GAFFNEY & JAMES CITY RAILROAD COMPANY.

*In the Matter of the Proposed Crossings of the Gaffney & James City Railroad Company over the Tracks of the Kane & Elk Railroad, near Gaffney.*

*Grade crossings—Approval of—Public safety.*

The petitioner, the Gaffney & James City Railroad Company, asks for a Certificate of Public Convenience approving three grade crossings to be made by its tracks over the tracks of the Kane & Elk Railroad.

The proposed line of the petitioner will effect a connection between the plant of the American Plate Glass Company and the B. & O. Railroad system, and will afford passengers and freight in the vicinity of this plant certain accommodations not now enjoyed. The proposed line is the only practicable route by which the petitioner can enter the desired territory. None of the crossings will be main line crossings and no fast trains will be run over the tracks at such crossings.

*Held:* The Certificate of Public Convenience should issue upon certain conditions, herein prescribed, relative to the construction and operation of said crossings, which will insure the safety and protect the interests of the public.

APPLICATION DOCKET NO. 126.

Sumbitted May 20, 1914.

Decided August 5, 1914.

Report and Order of the Commission.

COMMISSIONER WRIGHT:

There was a hearing and there was also a re-hearing before the Commission upon an application for a Certificate of Public Convenience, approving the construction of the proposed crossings in this case. The Commission also caused an examination to be made upon the ground by its chief engineer and the investigator of accidents.

The Commission has given careful consideration to the matter and it appears that Kane is a thriving, industrial municipality of

about 7,000 inhabitants, located on the Philadelphia and Erie Division of the Pennsylvania Railroad system, in Wetmore Township, southwestern corner of McKean County. The Pittsburgh and Western Railroad, operated by the Baltimore and Ohio Railroad Company, passes through said township and just west of Kane Borough, being a part of the line from Mt. Jewett to Pittsburgh. A spur has been run into the borough and here is maintained a passenger station, freight yards, repair shops and other terminal facilities. About four miles south of Kane, on the said P. & W. Railroad, in Jones Township, Elk County, there is a little settlement at a pumping station on an oil pipe line, and a flag station known as Gaffney. About a mile north of this station is the point of beginning of the Gaffney and James City Railroad. From this point it extends in a general southwesterly direction into Highland Township, Elk County, a total distance of about 8,600 feet to the plant of the American Plate Glass Company.

The entire territory under consideration is sparsely populated and mostly covered with a second growth of wood with much scrub. Now and then there are patches of open, cultivated land. Eight years ago, the American Plate Glass Company came into this rural district, cleared the ground and erected at a cost of about two and a half million dollars, a modern plate glass plant and at a distance of a third of a mile or more beyond, to the west, built seventy-five dwellings for occupancy by its employees. This village is known as James City and it has to-day about 400 inhabitants. All of the men living here are employed at the glass plant; the remainder of the 500 employees reside in Kane chiefly, and they are transported back and forth in various ways, but principally by the Kane and Elk Railroad, a local line operating between McKinley, in Highland Township, and a point in the suburbs of Kane Borough. This local railroad is reported to be subsidiary to the Pennsylvania system. At the present time, it is the only means available for the bringing in of raw material to the glass plant and for the shipment therefrom of the finished product.

For the better accommodation of the public in James City and for the transaction of the business of the American Plate Glass Company, three or four years ago, the Gaffney and James City Railroad Company was incorporated and began, in 1911, to lay

standard gauge track from the said point near Gaffney station to the glass plant and James City, whereupon the Kane and Elk Railroad Company proceeded by legal and other means to obstruct and prevent the construction of the proposed competitive line. When this new line is completed and put in operation, it will land James City passengers in the heart of Kane Borough and establish a connection to all of the lines of the Baltimore and Ohio system, facilities which will undoubtedly be availed of.

The main line of the Kane and Elk Railroad Company does not reach the glass plant. It lies to the northwest in a valley about one-half mile distant. From it the said railroad company has built a switch-back up the hillside with connections to the American Plate Glass Company plant. This switch-back in places has a four per cent. grade or more and in order to operate such a steep grade a geared-wheel locomotive is used. This switch-back terminates about 200 feet east of a public road and about 1,200 feet east of the buildings of the glass plant. Just west of the public road there is a "Y" siding extending southerly paralleling the highway for several feet where it ends. Some of the rails on this siding have been taken up and it is not used as intended as a part of a "Y" into the yard of the glass plant.

West of this siding and leading off the main switch-back of the Kane and Elk Railroad Company, there is a branch about 600 feet in length that runs into the finishing department of the glass plant. Two hundred feet further west there is a parallel branch which runs into the raw material department of the glass plant. These two branches, which for convenience have been denominated (a) and (b) respectively, are owned by the railroad company up to the property line of the plate glass company, which line is about thirty feet from the end of the buildings. Beyond this line the tracks in the works are owned by the glass company; so that what to the observer appears to be the switching yard of the glass plant is owned and belongs wholly to the Kane and Elk Railroad Company, or individuals connected therewith.

The track of the Gaffney and James City Railroad Company is laid to and across the public road that is now crossed at grade by the main switch-back of the Kane and Elk Railroad Company and terminates about 150 feet westerly of said highway, and in

order to reach the glass plant the track of the Gaffney and James City Railroad Company must be extended at grade across the siding, hereinbefore mentioned, of the Kane and Elk Railroad Company. It is about 700 feet from this proposed railroad crossing to the glass plant, and immediately west of this proposed crossing the track of the Gaffney and James City Railroad Company will branch. One branch will extend at grade across the (a) branch of the Kane and Elk Railroad Company and lead into the raw material department of the plant; the other branch will also extend across the said (a) branch of the Kane and Elk Railroad Company and lead into the shipping department of the plant. Hence, there will be three crossings at grade by the proposed tracks of the Gaffney and James City Railroad of the existing tracks of the Kane and Elk Railroad and these three crossings at grade will be, in what may be considered, the switching yard at the American Plate Glass Company Works. It would not be practicable for the petitioner to enter the receiving or shipping departments of the said glass company in any other way than at the points proposed and by the grade crossings proposed. Any other arrangement would require a re-building of the plant. In a switching yard there has to be cross-overs and connections at grade. In the switching yard in question, part of which is on land owned by the glass company and part on land owned by the Kane and Elk Railroad Company or individuals concerned in said railroad company, the connections at grade must be at the existing tracks entering the works. Either one of the two railroad companies must deliver or take cars that have passed or are to be passed over their respective lines, at these points and at the same grade. Therefore, beyond the plant there must necessarily be crossings at grade within the limits of the switching yard.

The petitioner states that the number of trains to be run over the proposed line will not in its opinion exceed three daily. The fact is emphasized that the proposed crossings of the tracks of the Kane and Elk Railroad by the tracks of the Gaffney and James City Railroad will not be main line crossings. No fast trains will ever be run over the tracks at such crossings and passenger service will not be afforded at or in the vicinity of said crossings, it being a terminal point for both railroads. The move-

ment of cars over the said crossings and along the said switches of both railroads in the yard and into and out of the glass plant, will be for freight traffic only.

The Commission, as a result of its investigations and consideration of the application as required by law and having in mind the public interest and safety, will order certain modifications in the submitted plans and specifications for the construction of the said three crossings, which modifications are set forth in the Certificate of Public Convenience, with the revised plan thereto attached. The Certificate of Public Convenience will be issued subject to the following conditions, relative to the construction and operation of the three proposed grade crossings:

1. The Gaffney and James City Railroad Company shall construct and maintain the crossings at grade at points marked A, B and C, on the plan entitled "Gaffney and James City Railroad Company Plan, showing crossings over side-tracks of the Kane and Elk Railroad Company, as modified and amended by The Public Service Commission, August 5, 1914; scale, one inch equals forty feet, and on file in the office of the Commission, the form of construction to be that of standard railroad crossings.
2. The Gaffney and James City Railroad Company shall construct and maintain one hand-operated semaphore on its own right-of-way, but in the vicinity of crossing "A," reference being made to the plan mentioned in the preceding condition. The object of this is to provide a distance signal so that the Kane and Elk Railroad movement of cars into the yards shall not be made when the target is set against it or vice versa. Therefore, the said Gaffney and James city Railroad Company shall make suitable arrangements with and permit the Kane and Elk Railroad Company to jointly operate the said hand semaphore.
3. And subject to the further condition, that if at any time in the opinion of The Public Service Commission the public convenience or safety requires any additional precautions or any changes to be made at or in the vicinity of the said crossings, hereby or herein approved, then upon order so to do by The Public Service Commission, the Gaffney and



James City Railroad Company shall forthwith proceed to execute such order or orders.

**ORDER.**

This case being at issue upon petition and protest, on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, submitted and filed of record a report containing its findings of facts and conclusions, which said report is hereby referred to and made a part hereof.

*Now, to wit, August 5, 1914, it is ordered* that a Certificate of Public Convenience be issued, evidencing the Commission's approval of the proposed crossings of the Gaffney and James City Railroad Company over the tracks of the Kane and Elk Railroad Company near Gaffney, subject to the conditions specified in the report of the Commission filed herewith.

By the Commission,  
FRANK M. WALLACE, *Acting Chairman.*

EDWARD J. METER *v.* METROPOLITAN ELECTRIC COMPANY.

*Electric service—Installation of meters—Reasonable rules.*

The complainant operates within his home a motor in connection with an X-ray machine. He complains that the respondent company has required the installation of two meters, one to measure the current used by said motor, and one to measure the current used for lighting. The testimony shows that the respondent has established different rates for each of these services, and fails to show that the said rates are unjust or unreasonable.

*Held:* The complaint should be dismissed.

COMPLAINT DOCKET No. 246

Report and Order of the Commission.

Submitted June 30, 1914.

Decided September 1, 1914.

COMMISSIONER TONE:

On June 30, 1914, Edward J. Meter, of the city of Reading,

made a complaint to the Commission that under the practices of the Metropolitan Electric Company he was compelled to install at his place of business in said city two meters to measure the electric current used by him in the premises and to enter into two contracts,—one known as a power contract and the other as a light contract, the minimum rate under each contract being different.

At the hearing it appeared that the complainant was using the current furnished by the respondent for two purposes, to wit, for lighting his house and for operating a motor used in connection with an X-ray machine. The respondent insisted that under the tariffs and rules and regulations filed by it with the Commission, and posted according to law, the complainant was required to install two meters—one to be used for measuring the current consumed in lighting the house and the other for measuring the current consumed in operating the motor. The testimony of the witnesses produced and an examination of the schedules and tariffs of the company on file show that the respondent has established separate rates for each of the services mentioned, and there was no testimony produced to show that the rates established are not just and reasonable.

It appearing to the Commission therefore that the rates and practices of the respondent in this instance are just and reasonable, it is hereby directed that an order be entered dismissing the complaint in this case.

#### ORDER.

This case being at issue on complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

*Now*, to wit, September 1, 1914, *it is ordered*, that the complaint in this proceeding be and it is hereby dismissed.

By the Commission,  
FRANK M. WALLACE, *Acting Chairman*.

## JOHN A. ERNST, ET AL., v. GLENSIDE WATER CO.

*Water company—Inadequate and impure supply—Excessive rates.*

Complainants alleged that the rates and service of the respondent company have been unsatisfactory in that (1) the supply of water has been inadequate, (2) that the water furnished was unclean, and (3) that the rates charged were excessive.

The testimony (1) shows that the inadequacy of the supply has occurred upon a few occasions only, and was caused by a defect in the plant, which can be easily remedied, (2) did not support the allegation that the water was impure, and (3) showed that, although the rates charged were higher than those in a large city nearby, the company has been operating at a loss, has not paid its officers and operators any salaries, and has but few customers, being located in a small community.

*Held:* (1) That such improvements in the plant be made as to insure an adequate supply of water at all times.

(2) That the rates charged are reasonable. The fact that the rates are lower in a large community nearby does not prove that the higher rates charged in this small community are unreasonable.

COMPLAINT DOCKET, No. 205, 1914.

Report and Order of the Commission.

Submitted May 14, 1914.

Decided August 18, 1914.

## COMMISSIONER BRECHT:

Glenside is a small village lying directly across the Schuylkill river from the City of Reading, and is connected with the latter by an iron bridge. It contains eighty odd houses, but has no public buildings, manufactories, or warehouses within its borders. The village is therefore, wholly a residential community.

The people of Glenside have been furnished with water for domestic and other incidental consumption by the Glenside Water Company, a corporation which was chartered in November, 1902. In the month of May following, the water company aforesaid entered into a contract with the City of Reading to supply the water which the said company expected to deliver to the consumers of Glenside when it commenced operations. In February, 1904, the Glenside Water Company began to supply the citizens of Glenside with water and continued the service until August 1, 1911, when the city was enjoined from selling water thereafter to consumers outside of the city limits.

When the injunction was served upon the Glenside Water Company, it began to look around for another source from which to obtain its supply of water. Tulpehocken creek is flowing along the border of the village but as its water was used for power purposes, the company could not obtain water from that source without being "held for damages for diverting the water." To take the water from the Schuylkill river it was necessary to construct a filtration plant and power house, and the cost of erecting such a plant equipment adequate in all respects would be so great, as was found from an estimate, submitted to the company that it would make the rates to consumers in a small community like Glenside prohibitive, and water had therefore to be obtained from some other source. Accordingly, in August, 1911, the company entered into arrangements to have an artesian well drilled, and after two years' drilling water was obtained at a depth of 410 feet. On the 16th of June, 1913, the company began to supply the community of Glenside with water from the artesian well by means of a pump and standpipe.

In the complaint now pending against the Glenside Water Company on behalf of the citizens of Glenside it is alleged (1) that "the supply of water now furnished by the company is inadequate and insufficient;" that "the complainants were and are unable to get a sufficient supply of water, especially on the second story of their houses, on account of the low and insufficient pressure;" (2) that "the water furnished is not clean, but full of grit and sand, causing the pipes and especially the water backs in the kitchen stoves to clog up, causing grave danger from explosions . . . " (3) that "the rates charged by the defendant company are excessive and exorbitant."

(1) With respect to the charge that the supply of water now furnished to the people of Glenside is insufficient in quantity: It was admitted by complainant that there would be "plenty of water" if the standpipe were kept filled. No testimony was offered to show that the capacity of the pump in use is not adequate to keep the standpipe full of water, and thus meet all of the requirements of the consumers. The testimony submitted by the president of the Berks Engineering Company, who originally installed the pump, sets forth that "the pump as it works to-day

has a capacity of 34,312 gallons in twenty-four hours, or 2,263 gallons per hour." and that the pump can be adjusted to supply 10,000 gallons per hour.

As to the insufficient supply of water, especially on the second story of the houses, a number of witnesses testified that on or about February 9th and 13th last, and on three or four days throughout the month of March, no water could be drawn in most instances during the greater part of the day. One of the witnesses testified that he also had the same trouble on the 16th and 20th of June, and found that the gauge on the standpipe at that time indicated that there were only twenty-two and a half feet of water in the pipe. In reply to question of counsel: "Does this frequently happen?" witness answered "16th and 20th of June."

From the testimony offered by complainant at the hearing, it appears that the trouble experienced by the citizens of Glenside in not getting an adequate supply of water was confined very largely to the three or four days each in March and February last. A few families living on the more elevated sections of the village also had a shortage in the water supply on the second story of their houses on a few other occasions. But no specific dates were given or particulars cited when there was an inadequacy in the supply of water except on the three or four days in February and March, and on the 16th and 20th of June as testified by one witness.

Respondent admitted that on the days specified in February and March by complainant, the company was unable to furnish water to its patrons on account of trouble in the pumping machinery caused by the freezing of the automatic device which is used in starting and stopping the pump. This device is connected with a pressure gauge, and when the water reaches within three feet of the top of the standpipe, the circuit is cut out and the pump stopped automatically; and when the level of the water in the tank has fallen ten feet, the circuit is again established and the pump started. Under this method of operating the flow of water from the well, there are sixty-seven feet of water in the standpipe when the pump is stopped, and ten feet less, or fifty-seven feet of water in the pipe when the pump is started again. But as the pipe leading from the automatic device to the gauge is only a

quarter inch pipe it froze quickly "a number of times before it was discovered," and consequently, the pump not being started, the water would reach a low level in the standpipe and interfere more or less with the distribution of water to the consumers.

The type of device now in use was recommended to the company and installed under the contract of constructing the plant, but since it has been found to be unsatisfactory in freezing weather, instructions have been given by respondent to dispense with the small pipe, and install an automatic that will connect directly with the pressure gauge, and thus eliminate the trouble experienced last winter during the extreme cold.

As to the character of the plant of the Glenside Water Company, the following evidence was given by the chief engineer of the Bureau of Water of the city of Reading:

Q. Have you made an examination of their plant since that time?

A. Yes sir.

Q. When?

A. Since the pump has been erected.

Q. What have you to say as to their method of supplying water to their consumers?

A. It seems to be up to date.

Q. The method of pumping, the automatic device and standpipe, will you state whether in your opinion as a hydraulic expert, it is sufficient for the people of Glenside at this time?

A. It is.

(2) With respect to the "grit and sand" found in the water and the danger of explosion due to pipes and waterbacks becoming clogged therefrom: A sample of water and several samples of "grit and sand" were offered in evidence by the complainant to substantiate this charge. It developed that the person who obtained the sample of water was not present to testify as to where or when he procured the water. The samples of "grit and sand" offered in evidence were taken out of water backs in kitchen stoves, and had the appearance of the usual limestone scale found adhering to the sides and bottom of vessels used some length of time for the purpose of heating limestone water.

As the present water supply was installed not more than a year before the samples offered in evidence were secured, it is difficult to understand how a hard gritty shell a quarter of an inch or more

in thickness could be deposited on the lining of a water back in so short an interval of time. If however the substance taken from the water backs is "grit and sand," and not the ordinary scale deposit found in vessels when limestone water is heated, it would not necessarily follow that the said material was found in the water pumped in the past year from the artesian well 410 feet deep, and distributed by gravity from a standpipe, but may be due to the water supplied from the City of Reading which was furnished to the people of Glenside during the ten years prior to June 15, 1913.

There was no evidence offered to show when the water backs from which the scale was taken had last been examined and cleaned out, and therefore as far as may be determined from the facts submitted to the Commission, the sediment of "grit and sand" may have been accumulating during the past five or ten years. The water supplied by the Glenside Water Company to the citizens of Glenside was examined and analyzed in January, 1913, by the State Board of Health and approved by certificate as being of standard purity.

The allegations made concerning explosions from clogged water backs in kitchen stoves were not supported by any testimony founded upon fact, but seemed to be based entirely upon a general report to that effect which had circulated in the community. There was no evidence offered to show where or when such explosions occurred, or that any explosions were connected with the service of the respondent company. The facts, therefore, submitted at the hearing are not deemed sufficient to hold the respondent company responsible for the alleged condition of the water now delivered to the people of Glenside.

(3) With respect to the alleged high and excessive rates charged: There were no facts or figures offered by complainant in support of this allegation except the general statement that the rates charged by the City of Reading for similar service are much lower than the rates at Glenside. But a mere comparison between the rates charged by a large municipality like Reading and the rates of a small community consisting of about eighty families is not sufficient for the purpose of arriving at a just and equitable rate. According to a decision of the Supreme Court of Pennsyl-

vania, a town where the work of obtaining a sufficient supply of water is difficult and expensive, could not be expected to have as low a rate for its water service as another town even of the same size and population, where the procurement of water is comparatively inexpensive.

From the testimony of the secretary and treasurer of the Glenside Water Company, it appears that the receipts of the company for the year ending June 30, 1914, were \$1,389.08; the operating expenses and interest charges for the same period were \$1,846.34, leaving a deficit of \$457.26. No salary was ever paid to its superintendent, or its secretary or treasurer, and no dividend was ever declared or paid upon its capital stock of \$5,000. The company has eighty-one consumers, and carries a bonded indebtedness of \$16,500, on which interest at the rate of 5% per annum is paid. Since there is no return on its investment, but a deficit of more than 30% of its total receipts, and since no evidence was produced at the hearing to controvert these figures, the Commission is of the opinion that the rates charged by the Glenside Water Company to consumers at Glenside are not excessive or exorbitant or unreasonably high.

However since the respondent company experienced considerable trouble at certain periods during the past winter in furnishing its patrons with an adequate supply of water, the commission will ask the said company to take the following steps of precaution in the operation of its plant at Glenside:

1. To make the improvement suggested at the hearing, in the character of the automatic device attached to the standpipe, before winter opens again.
2. To send to this Commission as soon as the aforesaid device has been installed, a brief description giving the principle of its construction, including a statement showing wherein the new device is superior to the one now in use.
3. To devise some plan by which the pipe that extends across the bridge and connects with the Reading water plant, and which the company proposes to use in cases of emergency, will be protected from freezing, so that it may be available for service whenever the occasion to use it may arise
4. To flush the fire plugs at Glenside at least once every spring and fall, in April and October respectively.
5. To notify the consumers promptly of any break in the pump-



- ing machinery or of any interruption in the service that will likely cut off the usual supply of water to the community.
6. To keep a record during the month of January, 1915, which will show for each day of the month the maximum and minimum height of water in the standpipe, and forward a copy of the report so kept to this Commission.

#### ORDER.

This case being at issue, upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

*Now*, to wit, August 18, 1914, *it is ordered*, that the complaint, in so far as it relates to the rates charged by the Glenside Water Company, be and it is hereby dismissed, and *it is further ordered*, that the Glenside Water Company carry out the improvements in the service of said company set forth in the report attached to and made a part hereof.

By the Commission,  
F. M. WALLACE, *Acting Chairman*.

MINERS ALONG THE SCHUYLKILL & SUSQUEHANNA BRANCH *v.*  
PHILADELPHIA & READING RAILWAY COMPANY.

DOCKET No. 50.

[For original opinion and order see 1 P. C. R. 99.—Ed.]

Supplemental Order of the Commission.

THE COMMISSION:

Whereas, it appears from a communication filed with this Commission by the Philadelphia & Reading Railway Company that the collieries where the miners from Outwood and vicinity are employed "are now working only a few days a week," and that on days when the mines are closed, the evening train installed by order of The Public Service Commission under date of March 6, 1914, for the benefit of the miners from Outwood and vicinity, is carrying, according to a record kept by the railway company from June 11th to July 17th, "on the average only three passengers daily" from Pine Grove to Outwood, and no passengers on the return trip from Outwood to Pine Grove, therefore, the request of the railway company to be given permission to discontinue the aforesaid train between Pine Grove and Outwood on the days when the mines are closed is granted, and authority hereby given to the Philadelphia & Reading Railway Company to put the same into effect.

FRANK M. WALLACE,  
*Acting Chairman.*

IN RE FREE TRANSPORTATION OF OFFICERS OF MUNICIPALITY.

In reply to an inquiry made by the Trenton, Bristol and Philadelphia Street Railway Company of Philadelphia, the Commission advised, under date of September 15, 1914, that the allowance of free transportation to municipal officers on the occasion of a large municipal celebration was forbidden by the Constitution of the State and by the provisions of The Public Service Company Law.

## IN RE USE OF STREETS OF MUNICIPALITY BY STREET RAILWAY.

S. H. Mountney, general manager of the Slate Belt Electric Street Railway, recently complained that the action of the borough of Pen Argyl in refusing to permit cars to stand on tracks at terminal points frequently resulted in patrons missing desired connections. The Commission in dismissing the complaint wrote in part as follows:

"Speaking generally, this Commission would have no authority under the act of assembly to issue any orders against boroughs, since they are not public service companies, within the meaning of The Public Service Company Law. Such boroughs are vested with certain authority over the use and occupation of the streets and highways within their territorial limits, and for an abuse of such authority, unwarrantably interfering with the performance of the railway's duty as a public service company, the company would have an appropriate remedy in the courts."

*Harrisburg, Pa., August 27, 1914.*

## IN RE ALLOWANCE OF DISCOUNT AFTER EXPIRATION OF DISCOUNT PERIOD.

In reply to an inquiry made by the Pressed Steel Car Company of Pittsburgh, the Commission advised, under date of September 1, 1914, that the allowance of a discount to a patron of a natural gas company, after the expiration of the period established for the allowance of such discount as set forth in the rules of the gas company on file with the Commission, is a discrimination, and is forbidden by The Public Service Company Law.

## COUNTY COURT OPINIONS.

COMMONWEALTH v. THE TONOPAH & GOLDFIELD R. R. Co.

*Tax on corporate loans—Foreign corporation—"Doing business in this Commonwealth"—Non-resident treasurer—Act of June 30, 1885, P. L. 193.*

The defendant railroad corporation, incorporated in Nevada, operating a railroad there, and having its principal office for the transaction of its business there, also maintained an office in Philadelphia for the convenience of its directors and its secretary. At this office the directors held meetings, received reports and information concerning the operation and condition of the property, but took no action resulting in the transaction of business with the citizens of Pennsylvania. The secretary of the defendant corporation was the only officer resident within the State.

The auditor general and state treasurer settled a tax upon the indebtedness of the corporation on the ground that it was "doing business in this Commonwealth."

*Held:* 1. "Doing business in this Commonwealth," within the meaning of the revenue laws, is to be interpreted to mean the employment or investment of capital or the use of property in the State, by a corporation in furtherance of its corporate purposes.

2. Though the directors met here and gave directions for the operation of the railroad, the actual operation took place in Nevada, and its corporate purposes were carried out there.

3. The Act of June 30, 1885, P. L. 193, and its supplements, imposing upon the treasurer of the company the duties of assessing and collecting the tax on loans, have no operation beyond the state, do not extend to the non-resident treasurer of this corporation, and are ineffective to bind this defendant.

Appeal from settlement of tax on corporate loans. C. P. Dauphin County. No. 119 Commonwealth Docket, 1911.

*Wm. M. Hargest*, Second Deputy Attorney General, for the Commonwealth.

*Olmsted and Stamm*, for appellant.

KUNKEL, P. J., Sept. 18, 1914.

This is an appeal by the defendant from the settlement of an account against it by the auditor general and state treasurer for the loan tax for the year 1910. It has been submitted to us for

trial without a jury. The facts are not in dispute and we find them to be as follows:

### FACTS.

The defendant is a corporation of the State of Nevada. It owns and operates a railroad in that state. Its principal office is there. All its accounts have at all times been kept in that state. All its supplies during the year 1910 were and still are ordered there and the clerical force of the company in that year was kept and employed there. Everything done in connection with the actual operation of its road was done there. However, in the year 1910, it rented two rooms as an office in the Bullitt Building, in Philadelphia, for the use and convenience of its secretary, who lived in Philadelphia, and also for the use of its directors, the majority of whom were residents or maintained offices in Pennsylvania. At this office the directors held their meetings, received reports and information concerning the operation and condition of the defendant's property in Nevada and gave directions in respect to the conduct and operation of its road in that state; but no action was taken that resulted in the transaction of any business with citizens of Pennsylvania, or eventuated in business dealings in Pennsylvania or in connection with or concerning any business carried on in this State. The office was also used for the convenience of the Pennsylvania stockholders in transferring stock. The defendant had no property in this State except the office furniture of the value of \$500. The secretary was the only salaried employee in this State. The interest on the indebtedness with respect to which the tax is claimed was payable at the office of the Land Title and Trust Company, in Philadelphia.

On June 5, 1911, the auditor general and state treasurer settled an account against the defendant company for the tax on its loans or indebtedness of \$421,000, amounting after deducting the treasurer's commission to \$1,627.16. From this account it duly appealed.

### DISCUSSION.

The question presented is whether the defendant under these facts was doing business in the State of Pennsylvania. The Act

of June 30, 1885, P. L. 193, requires the treasurer of every private corporation incorporated under the laws of this Commonwealth or the laws of any other state or the United States and "doing business in this Commonwealth," to assess and deduct from the interest which it pays on its indebtedness owned by residents of this Commonwealth the four mills tax on such indebtedness (Act of June 1, 1889, P. L. 420, amended by the Act of June 8, 1891, P. L. 229), and to pay the same into the state treasury. Upon wilful failure or neglect to perform these duties the corporation itself becomes liable for the tax. *Com. v. Phila. & Reading R. R. Co.*, 150 Pa. 312; *Com. v. Division Canal Co.*, 123 Pa. 594; *Com. v. L. V. R. R. Co.*, 129 Pa. 449; *Com. v. L. V. R. R. Co.*, 186 Pa. 235.

The Commonwealth contends that the fact that the directors of the defendant company met in this State and here received reports and gave directions with respect to the conduct of the defendant's operations in the state of Nevada amounted to the doing of business by the defendant in this State within the meaning of the Act of 1885. We are not able to agree with this contention. The meaning of the phrase "doing business in this Commonwealth," as used in the State revenue laws, has been passed upon by this court and by the Supreme Court in *Com. v. Standard Oil Co.*, 101 Pa. 119, and in *Com. v. The Conglomerate Mining Co.*, reported in 1 Dauphin County Reports, p. 85. This phrase is synonymous with the phrase "going into operation in this State," or employing capital or using property in this State, and is to be interpreted to mean the employment or investment of capital or the use of property in the State by a corporation in furtherance of its corporate purposes. *Com. v. Telephone Co.*, 129 Pa. 217. This defendant company uses and employs no property for such purpose in this State. It is operating a railroad in the state of Nevada. It is true that its directors meet here and give directions with respect to the operation of the railroad, but the actual operation of the road takes place in the state of Nevada and its corporate purposes are carried out there. We are unable to see how it can be held under these circumstances to be doing business in this State, either in the statutory sense or in the ordinary acceptance of the phrase. The purpose for which the defendant was

chartered was to operate a railroad in another state, and to that end it is exercising its corporate franchises there and not in this State. The action of its directors resident in this State in directing and supervising its operations, which are actually carried on in another state, can in no reasonable view, we think, be held to place the defendant in the position of doing its corporate business in this State.

Moreover, it may be observed that the duty of assessing and collecting the tax is imposed by the Act of 1885 on the treasurer of the company. There is no proof that the treasurer of the company resided or lived in the State or paid the interest on the indebtedness in this State. It appears that the only salaried officer in the State in the year 1910 was the secretary, and it also appears that the interest on the indebtedness on account of which the present tax is claimed was payable at the Land Title and Trust Company in Philadelphia. The Act of 1885 has no operation beyond the limits of this State; therefore it did not extend to the non-resident treasurer of this company. These facts bring the case within the ruling in *Com. v. Barrett Mfg. Co.*, lately decided in this court [16 Dau. Rep. 185] and affirmed by the Supreme Court, in which it was said by the latter court that, "Since treasurers are specifically named in the act (that is the Act of 1885), to perform both these duties (that is the duties of assessing and collecting the tax), we cannot by implication or upon any proper theory of law or statutory construction transfer this high obligation to a corporation designated as a mere paying facility, such as the Land Title and Trust Company is in this case." It would seem from this that the duties imposed by the statute must be performed by the treasurer, as he is the officer named therein. Neither the secretary of this company nor the Land Title and Trust Company of Philadelphia had any authority to perform these duties, and as the treasurer was beyond the operation of the statute it was ineffective to bind the defendant. For this reason also it is not liable for the tax which is here claimed.

#### CONCLUSIONS OF LAW.

Wherefore we conclude:

1. That the defendant company, under the facts as found, is

not doing business in this Commonwealth within the meaning of the term as used in the Act of June 30, 1885, P. L. 193.

2. That it was not the duty of the defendant company to collect the tax claimed in this settlement.

3. That the defendant company is not liable for the tax settled against it.

4. That the defendant is entitled to judgment.

Wherefore judgment is directed to be entered in favor of the defendant company and against the Commonwealth, unless exceptions be filed within the time limited by law.

**SICKLES v. WYOMING VALLEY TRUST CO., TRUSTEES, ET AL.**

*Foreclosure of corporation mortgage—Stockholders bill to restrain—Equity—Injunction.*

Plaintiff, a stockholder, was for a number of years in control of a street railway corporation, during which time he kept no books of its transactions except a cash book and a bank deposit book, freely intermingled its money with his individual accounts, rendered no account of money paid for obtaining the charter nor of money paid for stock, and conducted business without preserving records or vouchers. The company is now insolvent, and its income is insufficient to meet its expenses.

Plaintiff now asks for an injunction to restrain the defendant directors of the company, and the trustee, from foreclosing a mortgage upon the railway property, alleging a conspiracy among them to defraud him and other stockholders.

*Held:* The preliminary injunction should be dissolved.

*R. Trescott*, for plaintiff.

*F. R. Ikeler*, for defendant.

Motion to continue preliminary injunction. Common Pleas Luzerne County. In Equity. No. 20 October Term, 1913.

STRAUSS, J., February 27, 1914.

The plaintiff seeks to restrain by injunction the foreclosure of a mortgage executed and delivered by the defendant railway company to the Wyoming Valley Trust Company, trustee, dated October 1, 1910, and recorded in Luzerne County, Mortgage Book No. 179, page 86. This mortgage on its face appears to secure \$250,000 of bonds in the denomination of \$500 each, but as a matter of fact only \$43,500 are outstanding.



Default having been made in the payment of interest on January 1, 1913, the plaintiff avers that Samuel C. Jayne, and the other directors named as defendants, have fraudulently, illegally, and in violation of the plaintiff's rights and of law, procured the trustee to institute foreclosure proceedings by scire facias sur mortgage in the Court of Common Pleas of Columbia County, returnable August 25, 1913; and that Jayne, one of the defendants, is indebted to the street railway company in the sum of \$9,650 on account of bonds held by him, and that this amount, if paid, would be sufficient to pay all the outstanding indebtedness of the company, including all interest; that the said defendant directors have fraudulently and illegally conspired and agreed together to have the property of the railway company sold in such manner as to defraud the plaintiff and the other stockholders, bondholders and creditors of the company; that the gross income of the street railway company, if properly managed, would be sufficient to pay all operating expenses, fixed charges, including interest, without resorting to the foreclosure, but that the said company has been mismanaged by the individual defendants. The plaintiff prayed for an injunction to restrain the foreclosure and also the individual defendants from interfering with the management of the company by a receiver who might be appointed by the court. A preliminary injunction was granted and a receiver was duly appointed who is now in charge of the company's affairs.

A large mass of testimony and many exhibits have been produced. Plaintiff and defendants have submitted to the court voluminous requests for findings of law exactly as if the case were before us on final hearing. We have arrived at the conclusion that the plaintiff has no standing in a court of equity for the relief which he seeks; that he has not established the averments of his bill.

The plaintiff was, from the organization of the company down to some time in 1913, the president, manager and promoter of the Berwick & Nescopeck Street Railway Company. In 1905 the company was incorporated with an authorized capital of \$7,500. Only the required ten per cent., \$750, was paid into the treasury of the company. At or about the same time another charter was obtained for the Berwick & Suburban Company, with an author-

ized capital stock of \$35,000, on which only the required ten per cent., or \$3,500, was paid in. There is no definite evidence from which it can be found that either company undertook the actual work of constructing a railroad prior to 1910. In the meanwhile, the Berwick & Nescopeck Street Railway Co., in due course, authorized an increase of its capital stock from \$7,500 to \$100,000, and on July 29, 1910, authorized "the delivery to Avery Clinton Sickels, on the assignment and transfer by him to this company of all the stock of the Berwick & Suburban Street Railway Co., 1,850 shares, of the par value of \$92,500 of full paid stock of this company, in full payment for the said stock of the Berwick & Suburban Street Railway Company." The plaintiff ultimately became the owner of the entire \$100,000 of capital stock without payment for it of any money in cash into the treasury of the company, beyond, perhaps, the original ten per cent. required for organization. On the same day, July 29, 1910, the company authorized an increase of its indebtedness to \$250,000, specifically directing the execution of the bonds and mortgage already referred to. The plaintiff then had, and continued to have, full management and control of the company until June, 1913, and seems to have been accorded unlimited confidence by the individual defendants. He offered to build the road for the \$30,000 of bonds authorized in the mortgage to be immediately issued; and when the bonds were issued he offered some of them for sale to the individual defendants at less than par, selling some of them as low as sixty per cent. of their par value, and others at somewhat higher figures, and giving as a bonus, at least to some of the purchasers, from ten to twenty shares of stock for every \$1,000 of bonds sold. He has explained that he did this because he wanted those people on the board of directors. He took out of the \$30,000 of bonds \$12,500 for himself, paying in cash to the company not to exceed \$3,646.75; and he claims that the balance, viz: \$8,853.25 (see page 67 of the evidence) was taken for prior advancements made by him to the company, and paid for in full by crediting the company this amount on an indebtedness existing in his favor, in part because he had purchased four years previously steel to the amount of \$3,000, and other materials not itemized, required for the building of the road.

Although he had complete charge of the company's affairs, practically no books were kept of its transactions, beyond a cash book and bank deposit book that show the daily receipts from passengers and check books. What became of the original \$750 paid in when the charter was obtained, or of the \$3,500 paid in when the charter of the Berwick & Suburban Company was obtained, or what consideration was given for the issuing of the balance of the stock in both companies to the several stockholders, which finally became vested in the plaintiff, cannot be ascertained from any evidence that has been submitted. If any books have been kept showing any of these things, or showing the purchase of material by him, or if any vouchers exist from which information can be derived relating to these matters, they have not been brought to our attention, and the tendency of the evidence is to convince us that no such accounts were kept or vouchers preserved. Where business has been conducted without accounts or records, where vouchers have not been preserved, and consequently the rights of a plaintiff depend on evidence not much better than guessing or estimating at random purchases and expenditures covering a period of years, such evidence cannot be accepted as proof that thousands of dollars have been expended or handled; and this is especially so when the person who claims to have conducted a business in this loose fashion, is apparently a man of intelligence, education and experience accustomed to participate in large and numerous transactions, and when his testimony is at every material point contradicted by a number of reputable witnesses whose testimony is consistent with every day experiences of ordinary business men.

The company was still under his own management when the default was made in January, 1913, in the payment of interest. He has testified that he paid himself the interest due on his own bonds, but there seems to be no doubt that no other bondholders received that instalment. After the default the plaintiff ceased even to keep the daily receipts separate from his own funds. He states that he ceased to deposit them in a separate account in the bank but that he accumulated them in the company's office, keeping them in the safe and making cash payments out of the accumulation, and sending his own personal check for bills that

were to be paid out of town, taking the cash for such checks and depositing them in his own private account; but he has furnished no detailed statements or vouchers showing what payments he made, nor has he in any way satisfactorily accounted for the money which he subjected to this method of management. Up to July, 1910, all of the stockholders and directors, excepting S. C. Jayne and the plaintiff, were non-residents, either of the boroughs of Nescopeck or Berwick or vicinity. Up to that time the assets of the company, so far as there has been any definite proof, consisted chiefly of its minute books, its charter, franchise ordinances passed by the boroughs, and the resolutions for increase of capital or increase of indebtedness. In and after July, 1910, the individual defendants, largely as a result of plaintiff's solicitation, became connected with the company and provided funds for construction; and the non-resident stockholders and directors severed their connection with the company. Having obtained the co-operation and money of the residents, the plaintiff then proceeded to build the road as a contractor. The weight of the evidence is to that effect. While he denies that there was a sale of bonds by him to Jayne at sixty per cent., but asserts that Jayne purchased directly from the company and still owes the company, he also denies that he sold bonds to certain other of the defendants, though he admits that the payments by them at less than par were intended to be in full, saying in reference to Brockway and Doan at least, "I considered the deal closed at those figures."

Though there is no resolution upon the minutes from which the inference can be drawn with certainty concerning the first issue, \$30,000, of the bonds, there is a resolution, the correctness of which he admits in every respect, except that he claims the word "president" was omitted, and in one copy of the minutes has inserted it in his own handwriting by interlineation. This resolution, as originally drawn, authorized:

"That \$13,500 in bonds be issued to Avery Clinton Sickels for the completion of the Berwick & Nescopeck Street Railway, according to the borough ordinance of the borough of Berwick. \* \* \* and that such bonds shall be issued upon the filing of a five thousand (\$5,000) dollar bond, duly approved by the directors of the Berwick & Nescopeck Street Railway, and for the pay-

ment of all present current bills to put the company on firm financial basis."

That this \$5,000 bond was to be a bond from the plaintiff personally, is shown by his admission in the testimony at page 111.

About a mile and a half of railroad has been constructed and is now represented by an outstanding \$100,000 of stock and \$43,500 of bonds. The minute book is an "ideal scrap book," with blank pages of mucedilaged manilla paper, to which the typewritten minutes were pasted or attached prior to 1911. After that the typewritten minutes, unsigned, were loosely laid between the pages of this book and were in that condition when produced. There has not, however, been any question as to the correctness of the several minutes that were produced, except in the case already referred to, where the plaintiff claimed the word "president" was omitted.

In discussing the plaintiff's action in connection with his management of this company as we have done, it is not our purpose to approve the shilly-shally methods that were permitted by the individual defendants who were directors after September, 1910, or of Mr. Jayne, who was the secretary and treasurer. Of course, it was the duty of Mr. Jayne to sign these minutes and to fasten them into the book provided for the purpose. His many years of experience make it difficult to understand why he did not perform that duty. It would seem as if a hypnotic influence had intervened whereby the defendants, who are the only persons who have been able to prove definitely the investment of considerable sums of money in this enterprise, have allowed the plaintiff in the most unbusinesslike way to conduct the affairs of the company. If these defendant directors were seeking in a court of equity affirmative relief from their own neglect, they would probably have difficulty in obtaining it. Fortunately for them they are the defendants and are protected by the rule that the position of the defendant in equity is the better one (*potior est conditio defendentis*).

The evidence shows that under present circumstances this company is insolvent; that its annual income is not sufficient to provide for the regular expenses of the company, including the taxes, pay-rolls, power bills, franchise charges, interest on its mortgage, and the indebtedness which has accrued.

If this were a final hearing we would take up the several requests for findings of law and fact on both sides and dispose of them, but as it is only an interlocutory motion, we shall not do so. There is, however, utility for a receivership pending foreclosure proceedings, and we can see no good reason why the receiver already appointed should not continue to act.

Since the evidence was closed and the final arguments were submitted, the plaintiff has amended the bill in several respects, but we fail to see how they affect the issue. The present plaintiff originally was plaintiff in the bill as an individual and as the president of the Berwick & Nescopeck Street Railway Company. The first amendment makes him a plaintiff in the bill as trustee for Margaret M. Watts, and there is an averment in the amendment that the plaintiff is a stockholder, bondholder and creditor of the Berwick & Nescopeck Street Railway Company, and as trustee for Margaret M. Watts, of the township of Salem, County of Luzerne, State of Pennsylvania, holds and controls 400 shares and upwards of the capital stock of the said street railway company; but there is no averment relative to the time when, and manner in which the said Margaret M. Watts became interested in the stock, or when the plaintiff became trustee, nor was there any evidence submitted on this matter.

The second amendment adds a twenty-fifth paragraph to the bill, denying the right of the Wyoming Valley Trust Company, trustee, to foreclose the mortgage, and averring that the said trust company is proceeding in violation of law and of the complainant's rights to foreclose the said mortgage. Wherefore the plaintiff also amends the prayer in that he now petitions for an injunction to command the defendants to pay into the treasury of the railway company the moneys due and owing by them upon bonds. As we have not sufficient evidence to find as a fact that as between the defendants named and this plaintiff there is any right in the plaintiff to have the defendants pay money over, or to assert that the defendants are indebted to the company on their bonds, this amendment can have no bearing to change the conclusion at which we have already arrived.

Now, February 27, 1914, the preliminary injunction heretofore granted is dissolved; the order appointing J. P. Lord receiver for

the Berwick & Nescopeck Street Railway Company is renewed, so that the said receiver shall remain in possession and control of the company, its assets and management under the supervision of the court until the termination of foreclosure proceedings already instituted at the suit of the Wyoming Valley Trust Company, Trustee, under the mortgage named in the bill.

J. C. LAMM, ET AL., v. THE PENSION MUTUAL LIFE INSURANCE Co.

*Insurance companies—Service on—Domicile.*

The plaintiffs, shareholders of the defendant mutual life insurance company, which was incorporated and has its offices in Pittsburgh, secured service of process upon it in that city. They are residents of Lackawanna County and ask the court there to appoint a receiver. The defendant has no property nor agency in said county, but has appeared for the purpose of raising the issue of the jurisdiction of the court.

*Held:* 1. The burden of showing jurisdiction is on the plaintiffs.

2. Upon the averments made in this case the court has no jurisdiction to appoint a receiver.

Motion for appointment of receiver. In the Court of Common Pleas of Lackawanna County. No. 4 June Term, 1914. In Equity.

L. P. Wedeman, for plaintiffs.

C. P. O'Malley and Joseph O'Brien, for defendant.

NEWCOMB, J., June 17, 1914.

Both in form and substance this bill and the procedure thus far had thereon are somewhat unusual, to say the least. But by agreement of parties the scope of the present motion is limited to the mere question of territorial jurisdiction, and defendant is deemed to have appeared only for the purpose of raising that issue, at this stage, in which plaintiffs have joined.

It may be observed that the relief now asked for at the very beginning is precisely the same as that ultimately aimed at on final hearing. Furthermore, the court is asked, in chief and not as a mere incident, to assume the management of a going concern without either allegation or proof of insolvency or any other occasion for winding up its affairs, as that is not prayed for.

Defendant is a domestic corporation having its place of business in the city of Pittsburgh as authorized by its charter. Thus the county of Allegheny becomes the place of its legal domicile: *Park Bros. v. Boiler Works*, 204 Pa. 453.

It is not alleged to have either property or agency in any other county. The only fact appearing in the bill at all local to this county is that the plaintiffs reside here. At least it may be assumed that residence is meant by the averment that they are "citizens" of the county. The return, such as it is, shows that service was made in Pittsburgh, and defendant is not alleged to be in any way amenable to service elsewhere.

Hence, the case presented is that of a shareholder's bill against a strictly non-resident insurance company to have the internal management of its business taken over by this court temporarily, although there are no assets of any kind nor means of service in this county.

On its face the proposition is so anomalous that plaintiffs must be deemed to have the burden of showing the jurisdiction affirmatively.

They take the broad ground that it is complete in any county where the aggrieved shareholders may reside. But the position is not sustained by the decisions relied upon by counsel. In *Treat v. Ins. Co.*, 199 Pa. 326—S. C. 203 Ib. 21—no such question was presented. Defendant was there sued in the county of its legal domicile. The same is true of *Bank v. Construction Co.*, 227 Ib. 354. Counsel lays stress on the fact that the only assets here consist of the moneys to become payable to defendant on its outstanding contracts, and cites *Wiener v. Ins. Co.*, 224 Pa. 292, as ruling the point in his favor because it was held that the principle which limits the jurisdiction to the county where the property is situate applies only in cases of tangible property, capable of manual seizure, and not where it consists of choses in action.

But that is quite irrelevant here for want of any analogy on the essential facts. It was a proceeding by foreign attachment which is statutory. The statute makes all debts due to the defendant expressly subject to the writ. There was no defect of jurisdiction as to the person of the debtor, and that is the test of effective process in such case: *Ins. Co. v. Chambers*, 53 N. J. Eq. 468;



Harris v. Balk, 198 U. S. 215. There had been no attempt to make an extra territorial service of the writ. Both defendant and garnishee regarded itself as properly in court, as both appeared and took defense by answer in due order. The proceeding being, therefore, free from controversy on the subject of local service and personal jurisdiction of the parties, the narrow question was presented whether a debt owing by a foreign corporation was attachable, on the theory that in contemplation of law it must be deemed to have a situs which lay outside the confines of the local jurisdiction.

The theory failed justly because, like poker chips, mere personal debts have no home. No such question arises, nor can arise here. The cause has reached no such stage. What the present motion is concerned with is the preliminary question, as to how this court can get personal jurisdiction of defendant on a bill of this character, and that is not satisfactorily shown. It would seem that for the matters complained of, resort must be had to the courts of Allegheny County, but as to that it is not intended to decide. It is only pertinent now to determine as to our own jurisdiction, and it is decided in the negative.

The rule to show cause is discharged.

COMMONWEALTH OF PENNSYLVANIA v. TORRANCE LAND COMPANY.

*Bonus—"Actual increase of capital stock"—Acts of May 3, 1899, P. L. 189, and February 9, 1901, P. L. 3.*

The defendant corporation has an authorized capital stock of \$5,500 divided into 110 shares of \$50 each, on which it has paid a bonus to the Commonwealth. Each stockholder, however, paid \$500 into the treasury on account of each \$50 share. There is no evidence that there was any stipulation or understanding that any part of the amount was regarded as surplus or as anything else than capital stock of the corporation. The company thus had the sum of \$55,000 for corporate purposes. The capital stock reports for seven years from 1905 to 1911 state that the authorized capital is \$55,000 and the amount paid in is \$55,000.

To an action of assumpsit by the Commonwealth to recover bonus due, the affidavit of defense sets forth that the report of \$55,000 as the authorized capital stock is an error.

*Held:* The Acts of May 3, 1899, P. L. 189, and February 9, 1901, P. L. 3, impose a bonus upon the capital stock actually possessed by a corporation. This defendant actually possessed a capital stock of \$55,000. It follows that a bonus must be paid on the amount of capital stock over and above \$5,500.

In the Court of Common Pleas of Dauphin County. 255 Commonwealth Docket, 1912. Assumpsit.

*John C. Bell*, Attorney General, for the Commonwealth.

*Homer Shoemaker*, for defendant.

McCARRELL, J., Sept. 24, 1914.

This is an action of assumpsit brought upon a settlement for bonus on capital stock, made by the auditor general and state treasurer July 1, 1912. The settlement is unappealed from, and under the law is conclusive against the defendant company. On August 30, 1912, the defendant filed a petition with the auditor general asking for a re-settlement of the account, alleging that its capital was only \$5,500, and not \$55,000, as found by the accounting officers in the settlement. The defendant has filed an affidavit of defense averring that the authorized capital of the company is only \$5,500, that its capital was never increased, and that any statements appearing upon the company's reports to the auditor general that the capital was \$55,000 were erroneous. The affidavit of defense, however, specifically avers that when the 110 shares of the capital stock of the said defendant were issued each stockholder paid into the treasury of the said defendant at the rate of \$500 for each share of stock issued to him and received therefor a certificate for the number of shares for which he had subscribed at the par value of \$50 each.

Trial by jury has been duly waived. The Commonwealth presented capital stock reports of the defendant for the years 1905, 1906, 1907, 1908, 1909, 1910 and 1911, in each of which the authorized capital is stated to be \$55,000, and the amount of capital paid in \$55,000. This amount is stated as a liability of the company in these reports. The affidavit of defense shows that at the time of the organization of the company each stockholder paid \$500 per share for each share of the capital stock issued to

him, and thus there was contributed by the stockholders at the date of the organization of the company the sum of \$55,000 for corporate purposes. The application, approved July 16, 1901, states that the authorized capital is only \$5,500. According to the affidavit of defense the \$500 per share contributed by each stockholder for each share of his stock at the time of the organization was a contribution to the capital stock of the company, and the reports of the corporate officers for the years above mentioned show that it was regarded by the corporation as capital stock. No proof to the contrary was offered.

The Act of May 3, 1899, P. L. 189, requires the payment of a bonus of one-third of one per cent. upon the amount of the capital stock which said company is authorized to have and a like bonus on any subsequent authorized increase thereof. The Act of February 9, 1901, P. L. 3, provides as follows:

"Upon the actual increase of capital stock of such corporation it shall be the duty of the president or treasurer to make a return and pay such bonus on the actual increase shown by said return as shall then be prescribed by law."

These acts clearly impose a bonus upon the capital stock possessed by every corporation of the State, and we are satisfied that the defendant company has actually possessed a capital stock of \$55,000 from the time of its organization. Its stockholders contributed this money for the capital stock certificates issued to them, and there is no evidence that there was any stipulation or understanding that any part of the amount so contributed was regarded as surplus, or intended to be regarded as anything else than capital stock of the corporation. The settlement made July 1, 1912, and unappealed from, is under the law conclusive upon the defendant. It, however, filed an application for a re-settlement upon the last day when it could have taken an appeal. The accounting officers refused to make any re-settlement and certified the settlement already made to the attorney general for collection, but we have considered the questions raised by this application.

From all the evidence submitted to us we find that the capital stock of the defendant company at the time of its organization, authorized, and actually contributed by the stockholders was \$55,-

000, and that the bonus paid was only on \$5,500. At the time of settlement there was legally due to the Commonwealth for balance of bonus due upon capital stock the sum of \$165, as stated in the settlement. We therefore direct that judgment be entered in favor of the Commonwealth and against the defendant for the sum of \$165, with interest from August 30, 1912, unless exceptions be filed within the time limited by law.

## DONALDSON, RECEIVER V. RABENHOLD.

*Stock subscriptions—Parties to contract—Sufficiency of affidavit of defense—Change in amount of capital stock—Fraud—Insurance company—Failure to begin business—Collateral attack—Action by receiver—Cash payment on stock subscription—Acts of May 1, 1876, P. L. 53, and June 1, 1911, P. L. 599.*

1. A receiver of an insurance company appointed under the Act of June 1, 1911, P. L. 599, represents all the subscribers to the capital stock as well as the corporation itself.

2. A subscription to the stock of a proposed corporation is not to be treated as a contract between the immediate parties only, but as one creating rights and liabilities between each particular subscriber and all others who may become such.

3. No defense can be successfully interposed by a subscriber to avoid his subscription which would be unfair and prejudicial to his co-subscribers.

4. The fact that the subscription contract was made by a third party acting as agent is no defense in an action by the corporation or its receiver to recover the amount subscribed.

5. An affidavit of defense is not sufficient in an action to recover on a stock subscription where it avers that the amount of the capital stock with which the company was actually incorporated was less than the amount represented at the time of making the subscription but does not aver a withdrawal of the subscription or lack of opportunity to do so.

6. An affidavit of defense is insufficient in such an action where it avers that the agent which received the subscriptions allowed the withdrawal of many subscriptions without the assent of the defendant, but does not disclose such facts as show a lack of assent, and does not aver that the withdrawals were under such circumstances that they could have been disallowed.

7. A vague and general averment that an enterprise is fraudulent is insufficient to prevent judgment in an action to recover on a subscription to stock.

8. Act of May 1, 1876, P. L. 53 (Sec. 5), directing that a subscriber to stock of an insurance company shall pay ten per cent. of the amount in cash, refers to subscriptions taken after articles of association have been executed and submitted and approved by the insurance commissioner, and will be strictly confined to such subscriptions.

9. Fraud practiced on the State in obtaining a charter is available to the State in a proceeding to annul the same, but cannot be set up by a private litigant as a ground of collateral attack upon the validity of a corporation.

10. Averments in an affidavit of defense, in an action to recover a stock subscription, which state that no certificates were issued to the defendant and if they had been issued they would have been worthless, are insufficient to prevent judgment.

11. Under Act of May 1, 1876, P. L. 53 (Sec. 9), failure to record the articles of association of an insurance company in the proper county renders the incorporators personally liable to persons dealing with it in ignorance of the incorporation but does not ipso facto avoid the corporation.

12. Failure of an insurance company to do business within one year of its incorporation is no defense in an action to recover on a stock subscription.

13. On every rule for judgment for want of a sufficient affidavit of defense a question arises whether the plaintiff, upon the facts declared is entitled to judgment.

14. In an action by a receiver to recover on a stock subscription, he must aver in the declaration that all or a specific amount subscribed is needed for the purpose of closing out the affairs of the company.

15. Whether under the Act of June 1, 1911, P. L. 599, a receiver of an insurance company may bring action in his own name and without averring that he brought it by leave of the court having control over him, *quare*.

Rule for judgment for want of a sufficient affidavit of defense.  
C. P. Berks Co., March T., 1913, No. 30.

*S. E. Bertolet and William Kerper Stevens*, for plaintiff.

*W. S. Rothermel and S. M. Meredith*, for defendant.

ENDLICH, P. J.:

The plaintiff's statement in this case shows that he was appointed by the Insurance Commissioner a special deputy and receiver of the Citizens' Life Insurance Company of America, under Act of June 1, 1911, P. L. 599; that on May 2, 1910, the defendant, by written contract with the Reading Finance and Securities Company, subscribed for fifty shares of the stock of the insurance company then proposed to be organized, agreeing to pay therefor \$20 per share; that in pursuance of his contract of subscription he gave to the Finance and Securities Company his notes dated May 2 and June 1, 1910, for \$510 each, payable four months after date; that after maturity of these notes they were endorsed, presented for payment at the place named in them and dishonored; and that the plaintiff is now, as receiver, the

holder of them. Upon these facts he claims to be entitled to recover the full amounts of the notes, with interest from their respective dates of maturity.

The affidavit of defense, admitting the execution of the contract of subscription, the giving of the notes and their non-payment, as well as the incorporation, since the giving of the notes, of the insurance company, with a capital stock of \$300,000, avers by way of defense (1) that when he subscribed the capital stock was represented to him as intended to be \$500,000, and that its reduction was without his assent or ratification; (2) that since the giving of the notes the Finance and Securities Company has allowed the withdrawal of a large number of subscriptions to the insurance company stock theretofore made, and returned the notes or cash given in payment thereof, without assent or ratification on the part of the defendant; (3) that the scheme to promote the insurance company was a fraudulent one on the part of "certain of the incorporators," intended to cheat and defraud the defendant and other subscribers; (4) that the subscriptions to the stock of the insurance company did not provide for payment of 10 per cent. of the subscription price in cash, etc.; (5) that the proposed stock, had it ever been issued, would have been worthless; (6) that no certificate of stock was ever issued to defendant; (7) that the insurance company forfeited its charter by failure to record the same in the office of the recorder of deeds, etc., in Berks County, and to issue any policies of insurance within a year from the time of its incorporation, by reason of which forfeiture any certificates of stock it could or would have issued to defendant would have been valueless, null and void; and (8) that plaintiff did not become the owner of the notes, and is not an innocent holder of them for a valuable consideration and before maturity.

It is reasonably plain from a reading of the declaration that the cause of action intended to be averred in this case is the contract of subscription, the notes given being but the evidences of the amounts due and of the time, etc., when they were payable. Or perhaps the contract of subscription and the notes ought to be regarded as together constituting the entire cause of action relied upon. In either view, the relevancy of the last matter (8) alleged in the affidavit is not apparent. The right of the

defendant to set up any equity which would be available in a suit between the original parties will not be disputed. But it must be borne in mind who are the parties to such a contract. A receiver as such ordinarily (and it would seem under the Act of 1911) represents all of them, not only the corporation: see *Booth v. Clark*, 17 How. (U. S.) 322; *Bank v. Kirk*, 216 Pa. 452. As against him, of course, no defense can be made which would not be made as against any of the interests he represents: *Dettra v. Kestner*, 147 Pa. 566, 574. Now, it is settled that a subscription to stock of a proposed corporation is not to be treated as a contract simply between the immediate parties to it, but as one creating rights and liabilities between each particular subscriber and all others who may become such, all subscribers being, in short, parties to it: *Graff v. Railroad Co.*, 31 Pa. 489; *Miller v. Railroad Co.*, 87 Pa. 95; *Railroad Co. v. Conway*, 177 Pa. 364; *Milk Co. v. Armstrong*, 38 Pa. Superior Ct. 350; *Garrett v. Lawn Mower Co.*, 39 Pa. Superior Ct. 78; *Machine Co. v. Bromeier*, 42 Pa. Superior Ct. 384. The result of this doctrine is that, as all these cases and many others show, no defense can be successfully interposed by a subscriber to avoid his subscription which would be unfair and prejudicial to this co-subscribers. Nor, in view of the considerations upon which the doctrine rests, does it seem of any moment that, the subscription being taken by some intervening party acting as agent for that purpose, the formal contract is made with such party. In *Edinboro Academy v. Robinson*, 37 Pa. 210, a subscription was taken by and in the names of certain persons described as "trustees for the purpose," the proposed corporation not being mentioned. Its incorporation having been effected subsequently, a suit on the subscription by it was held by the *nisi prius* court not to be sustainable, there being no privity between the parties to the action. But this ruling was reversed on error. It was held that the contract of subscription was one between the subscriber and all his fellows; that the corporation was the legal successor to the rights of all; that, as such, the money subscribed was payable to it; and that, therefore, it had the right to enforce payment by suit in its name. It is with this principle in view that the remaining defences here set up must be considered.



(1) The face of the subscription, as shown by the copy annexed to the declaration, bears out the averment that the capital stock of the proposed insurance company was understood to be \$500,000. A subscription given on the basis of a designated capitalization may be withdrawn upon final organization of the company, unassented to and unratified by the subscriber, with a less capital: *Garrett v. Railroad Co.*, 78 Pa. 465; *Electric Time Co. v. Leedom*, 149 Pa. 185; *York Flour Mill Co. v. Gallatin*, 10 York Leg. Record, 183. The affidavit, however, does not aver a withdrawal of his subscription by defendant, nor a lack of opportunity to withdraw it, by reason of unacquaintance with the facts or otherwise. The decision in *Electric Time Co. v. Leedom*, 149 Pa. 185, is not an authority for holding that the mere averment of organization with less capital than contemplated is, under all circumstances, sufficient to prevent judgment in an action upon a subscription. The allegation there was that the capital stock fixed was \$200,000, requiring \$165,000 of cash subscriptions—that it was represented to defendant, when he subscribed \$1,000, that his subscription brought the total subscribed to \$100,000—and that in truth there were only about \$50,000 of cash subscriptions. Upon these facts there arose, in the opinion of the Supreme Court, under the laws of another state not before it, a question of the validity of the company's charter, which could not be "adjudged conclusively upon an affidavit of defense."

(2) It has been said that where a corporation lets off part of the subscribers and returns to them their money other subscribers, neither actually nor impliedly consenting thereto, are discharged from liability upon their subscriptions: *McCully v. Railroad Co.*, 32 Pa. 25; *Pitts. & C. R. Co. v. Stewart*, 41 Pa. 54, 57. But a careful reading of those cases shows that this was spoken, in the first place, of an act of the corporation itself, and, in the second place, of that act in connection with other circumstances, the whole indicating an abandonment of the objects originally contemplated, resembling "a dissolution of partnership," or "the substitution of new and incongruous objects" (see 32 Pa. 25, 31). In neither particular does it fit this case. Nor does the affidavit disclose such facts as show that the defendant "neither actually nor impliedly" assented. And, finally, whilst alleging that "with-

drawals" were "allowed," etc., the affidavit does not undertake to say when or at what stage of the enterprise this occurred, or whether the withdrawals were such as could at all have been disallowed.

(3) The averment of the fraudulent character of the enterprise is, of course, entirely too general and vague to amount to a defense under any circumstances. Fraud must always be stated circumstantially, so that the court may be able to determine whether it is indicated as existing: *Gazzam v. Reading*, 202 Pa. 231, 238. The applicability of this rule to affidavits of defense has been too often declared to warrant a citation of the cases. It is enough to refer to *Sterling v. Insurance Co.*, 32 Pa. 75, where an averment almost identical with this was held insufficient.

(4) Section 5, Act of May 1, 1876, P. L. 53, directing that, at the time of subscribing for stock of an insurance company, the subscriber shall pay 10 per cent. of the amount in cash, etc., refers to subscriptions taken after articles of association have been executed and submitted to and approved by the insurance commissioner, etc. A review of the pertinent decisions in this State: *Turnpike Road v. Henderson*, 8 S. & R. 219; *Leighty v. Turnpike Co.*, 14 S. & R. 434; *Clark v. Navigation Co.*, 10 Watts, 364; *Plank Road Co. v. Brown*, 25 Pa. 156; *Railroad Co. v. Hickman*, 28 Pa. 318; *Hacker v. Refining Co.*, 73 Pa. 93; *Garrett v. Railroad Co.*, 78 Pa. 465, leads to the conclusion that a disregard of such direction makes a subscription unenforceable by either party to it in the absence of conduct precluding by way of estoppel a defense on the ground of illegality, but that its effect, when available, being to enable a person to take advantage of his own wrong in order to avoid a liability, the statutory direction is to be strictly confined to the precise kind of subscription dealt with—so that, if it refers to a subscription made before organization, it will not apply to one made after organization, and so on. Here the time or stage when defendant's subscription was made is not stated. It would seem to have been before the filing of articles of association. If so, the statute does not affect it.

The averment, however, touching this matter, seems to be made for still another purpose. It is intimated in *Garrett v. Railroad Co.*, 78 Pa. 465, at page 468, that the non-exaction of the 10 per

cent. cash payment, etc., upon a subscription at any stage may evidence bad faith in the promotion of the company towards the state—which, under a multitude of decisions, may, in turn, vitiate the incorporation. All that need be said of this aspect of the averment is that fraud practiced upon the State in the obtaining of a charter of incorporation, whilst available to the State in a proceeding to annul the same, cannot be set up by a private litigant as a ground of collateral attack upon the validity of the incorporation. This principle was emphatically declared in *Cochran v. Arnold*, 58 Pa. 399, and has since become firmly established by a long and uniform line of decisions following its lead.

(5) The allegation that the stock subscribed for, if issued, would have been worthless, can hardly be understood as involving the notion that the liability of a subscriber may be contingent upon the enterprise proving a financial success—which would be a patent absurdity. It is probably meant to convey the idea that there was no consideration for the subscription. So understood, it is disposed of by what is said in *Hacker v. Refining Co.*, 73 Pa. 93, at p. 97.

(6) Equally unavailing, for equally obvious reasons, is the allegation that no certificate of stock was ever issued to defendant. The mere fact of subscription to the stock of an as yet unformed corporation makes the subscriber a participant in the enterprise, entitled upon the act of incorporation, without more, to membership in the corporation and all the rights and privileges of membership: *Bole v. Fulton*, 233 Pa. 609, 611, including the incidental remedies for compelling recognition as a shareholder and redressing a refusal thereof. The formal issuance or non-issuance of a certificate to him is of no manner of consequence: see *Burr v. Wilcox*, 22 N. Y. 551.

(7) The Act of 1876, in section 9, requires, upon incorporation of an insurance company, the recording in the proper county of the articles of association, and in section 35 directs it to commence issuing policies within one year, in default whereof its corporate powers and existence shall cease.

It has been decided that failure to record in compliance with the statute renders the incorporators personally liable to persons who deal with the association in ignorance of its incorporation:

Guckert v. Hacke, 159 Pa. 303; Bank v. Crowell, 177 Pa. 313. But the very statement of that proposition negatives the idea that such failure ipso facto avoids the incorporation; and that idea is distinctly repudiated in Pinkerton v. Traction Co., 193 Pa. 229. If there is anything in the language of McCully v. Railroad Co., 32 Pa. 25 that seems to tend in the opposite direction, it was long ago robbed of such effect by the explanation of that decision in Allibone v. Hager, 46 Pa. 48, 54; Girard Bank v. Bank of Penn Township, 39 Pa. 92, 102; Hanover Junction & S. Ry. Co. v. Haldeman, 82 Pa. 36, 46.

As for the effect of a failure to do business, the rule laid down in the last cited case, at pp. 45 and 46, and many other decisions, is that any cause which may work a forfeiture of the charter of a company is not the subject of inquiry collaterally, and, therefore, not matter of defense to an action brought upon a subscription to its capital stock.

It would thus appear that there is nothing in this affidavit of defense capable of standing in the way of a recovery by plaintiff. But in every application for judgment for insufficiency of an affidavit of defense a question arises whether upon the facts declared by plaintiff he is entitled to such judgment: Reading v. Stocker, 4 Berks Co. L. J. 425, and cases cited at page 426. In their argument defendant's counsel have suggested certain reasons why this question, arising in this case, should, apart from anything advanced in the affidavit, be decided against the plaintiff.

One is that the action is wrongly brought in the name of the plaintiff as receiver, instead of in the name of the insurance company to his use as receiver: see Singerly v. Fox, 75 Pa. 112; Wisener, et al., Receivers, v. Myers, 3 Dist. R. 687. It is not clear, however, that the rule in this respect applicable to receivers appointed by the courts is equally so to receivers constituted, as here, under the Act of 1911 (see section 3). And the same observation applies to the next suggestion that, in order to maintain an action, a receiver must show that he has brought it by leave of the court having control over him: Wisener v. Myers, 3 Dist. R. 687. But the third seems to be well founded, namely, that, in a suit by a receiver to recover unpaid subscriptions to stock, his declaration should aver the need thereof (and the extent of that need) for the payment of debts or the closing out of the

business. This rule is laid down by Judge WICKHAM in the case last cited, with the addition that the need referred to should be determined by the proper court before suit brought. Whilst in accord with practice and principle in cases of receiverships created by the court: see *Wood v. Insurance Co.*, 154 Pa. 157, this addition may be out of place as relating to one constituted under the Act of 1911. At any rate it is not necessary for the purposes of this case to go to that length. Granting that subscribers to the stock of the insurance company, who have not paid, are liable at the call of its receiver for such proportion of their subscriptions as shall be required to equalize, upon a settlement of the receivership, all who embarked in the common enterprise: see 2 *Cook, Corp.*, § 641 (p. 1837), it does not follow that they can be required to pay any more than will answer that purpose. Plaintiff says: let them pay in full, and if there is any excess over what is requisite, they will get back each his share of it upon final accounting and distribution. Yet in common sense and reason, where only a portion of the unpaid subscriptions is really required for the legitimate purposes of the receivership, it would be manifestly wrong to exact their payment in full, with the effect of increasing the cost of the settlement, to the serious detriment of all compelled to pay to the advantage of no one entitled to come in upon final distribution. There is perhaps a seeming analogy between plaintiff's plan and the ruling obtained in cases of insolvent building associations. A borrowing member has to pay back the entire sum actually advanced to him, and take his turn on the general distribution: *Strohen v. S. F. & L. Ass'n*, 115 Pa. 273; *Leechburg B. & L. Ass'n v. Kinter*, 233 Pa. 354; *Stoddard v. Kline*, 51 Pa. Superior Ct. 16. But the reasons for that rule are such as to negative its applicability in any other cases. The capital stock of a building association differs from that of corporations generally in that its payment does not precede but is itself the entire object of the enterprise. Its final consummation is attained when a fund has been accumulated which gives to the stock its designated par value. A member who borrows from the society gets from it that value by anticipation, being bound in case of corporate disaster to return what he has thus received in excess of his pro rata share. As security for an advancement his obligation stands only while the society

is a going concern. When the latter breaks up, the obligation is simply an undertaking to repay the sum he has received. He then stands towards the society in the dual relation of debtor with respect to what has been loaned to him and creditor in respect to what he has paid on his stock. The two cannot be set off against each other, because the exact value of the stock can only be ascertained upon final accounting. In many jurisdictions, indeed: see 7 Thomps., Corp., § 8796, even in such cases it is held that the receiver can only call for repayment of what, upon a fair estimate of the assets and liabilities of the society, shall presently appear, needful to equalize the advanced member with his fellows. But in this State it is considered that the practical and satisfactory method of adjusting all rights is as above stated. No such complicated conditions exist in a case like that before us. The defendant has received nothing he is bound to repay. The question is simply how much he ought to contribute to the common loss in order to put him on an equality with his co-subscribers. Within conscionable limits that can be readily ascertained. The rule applicable to suits by receivers appointed by the courts for mutual insurance companies, which required such ascertainment in advance of suit and laid it open to impeachment on the ground of excessiveness: see *Hoffman v. Whelan*, 160 Pa. 94; *Fire Insurance Co. v. Boggs*, 172 Pa. 91, and other cases, furnishes, *mutatis mutandis*, a reasonable analogy for this case. There is in plaintiff's declaration no averment that the whole or any specific part of the amount subscribed by defendant is needed for the purpose of closing out the affairs of the insurance company with fairness to its members. It is true there is no denial of such necessity in the affidavit of defense. But the latter is not required to deny that which the declaration does not aver: *McPherson v. Bank*, 96 Pa. 135; *Deacon v. Smaltz*, 10 Pa. Superior Ct. 151—nor can a vital fact not averred in the declaration or expressly admitted in the affidavit be gathered inferentially from that which it does contain with the effect of basing thereon, in whole or in part, a judgment for plaintiff: *Taylor v. Beatty*, 202 Pa. 120, 126-7; *United States Brick Co. v. Shale Brick Co.*, 228 Pa. 81, 84. Because, for the reason discussed, the declaration does not on its face show plaintiff's right to judgment, we conclude that the plaintiff

is not entitled to one for want of a sufficient affidavit of defense in this case, and, therefore,

The rule to show cause is discharged.

DONALDSON, RECEIVER V. ROLLMAN; SAME V. RENTSCHLER.

*Stock subscriptions—Fraud—Withdrawal of subscription—Affidavit of defense in action to recover subscription—Sufficiency of.*

1. A contract to subscribe to stock is trilateral between the subscriber, the corporation and the other stockholders, and an affidavit of defense in an action to recover on such a contract, which alleges fraudulent misrepresentations by agents, is insufficient. The contract will be sustained for the benefit of the other stockholders.

2. In such an action an affidavit of defense which alleges misappropriation by the parties collecting the subscriptions is insufficient unless accompanied with a showing of a prompt withdrawal of the defendant's subscription upon the ground of the fraud alleged.

3. Subscriptions to stock may be freely withdrawn up to the time the articles of association are filed in the proper public office. In an action to recover on a stock subscription contract an affidavit of defense alleging withdrawal is insufficient if it fails to aver that the withdrawal was made in time and that notice thereof was given to the proper parties.

4. In such an action an affidavit of defense alleging that the subscriptions were made upon secret conditions contingently or absolutely relieving defendant from the same, is insufficient.

Rules for judgment for want of a sufficient affidavit of defense. C. P., Berks Co., March T., 1913, Nos. 28 and 31.

*S. E. Bertolet and William Kerper Stevens*, for plaintiff and rules.

*William Rick*, for defendants.

ENDLICH, P. J.:

In each of these cases the declaration and the cause of action disclosed by it are essentially similar to those considered in *Donaldson, Receiver, Etc., v. Rabenhold* (see preceding case), in which an opinion has just been filed.

The affidavits of defense, taken together, set up the fraudulent character of the proposed insurance company, the invalidity of its charter, its forfeiture, the worthlessness of the stock, the non-receipt by defendants of certificates, and plaintiff's acquisition of

the notes, with notice and without value, etc., so much in the same terms as in the case mentioned that what was there said upon these matters may be referred to as disposing of them here. The reduction of the capital stock is averted to in the Rollman case without any averment as to defendant's want of knowledge or assent, and in the Rentschler case as known to defendant before the renewal of his original note for his subscription, and therefore, under the rule discussed in the Rabenhold case, cuts no figure in either of these. There are, however, other averments here, not passed upon there, to the effect (a) that the subscriptions were obtained by fraudulent misrepresentations on the part of the persons who solicited them; (b) that the sums paid by subscribers to the agency having in charge the gathering of subscriptions were fraudulently misappropriated by that agency, composed in part of the same persons who, as officers, controlled the insurance company; (c) that the subscriptions sued for were withdrawn, in the Rollman case by return of the receipt to the insurance company and demand of cancellation, and in the Rentschler case by notice of refusal to pay, given to the insurance company "through the bank which held" his note, when coming due; and (d) in the Rentschler case that his subscription was subject to a condition agreed to between him and the person procuring it which remains unfulfilled. In view of the general principles pointed out in the Rabenhold case and under the authorities specifically applicable to these additional defenses, their insufficiency is hardly doubtful.

(a) The futility of the defense of fraudulent misrepresentations of agents, inducing defendants to subscribe, is apparent from the decision and cases cited in *Dettra v. Kestner*, 147 Pa. 566, the more recent ones of *Philadelphia & Del. Co. Ry. Co. v. Conway*, 177 Pa. 364; *Altoona Sanitary Milk Co. v. Armstrong*, 38 Pa. Superior Ct. 350; *Keystone Wrapping Machine Co. v. Bromeier*, 42 Pa. Superior Ct. 384, and many others.

(b) The misappropriation by the parties in charge of the gathering of subscriptions is plainly unavailing, remembering the nature of the contract of subscription and who the real parties to it are. Surely the wrongdoings of such agents are not to be visited upon defendants' co-subscribers, who had no more control over those agents than the defendants themselves. Even treated as an averment of misappropriation by those persons as officers of



the insurance company, this defense must be rejected, under *Iron & Steel Co. v. Selliez*, 175 Pa. 18. And, in any event, an allegation of fraud, such as is involved in this and the preceding proposition, would, in order to amount to a defense, have to be accompanied with a showing of prompt withdrawal of the defendants' subscriptions (*Howard v. Turner*, 155 Pa. 349) upon the ground of the very fraud alleged: *Upton v. Tribilcock*, 91 U. S. 45.

(c) It is settled that a stock subscription in a proposed corporation may be freely withdrawn up to the time of the filing of the articles of association in the proper public office: *Garrett v. Railroad Co.*, 78 Pa. 465; *Bolt Works v. Shultz*, 143 Pa. 256; *Traction Engine Co. v. De La Green*, 143 Pa. 269; *Fair Ass'n v. Greer*, 11 Pa. Superior Ct. 103; *Bottle Co. v. Cribbs*, 51 Pa. Superior Ct. 555. It does not appear in these cases that the defendants' alleged withdrawals were made in time. That fact, if it can hardly be doubted, ought to be made clear in the affidavits in order to render the defense complete. What ought to be therein stated, and is not, is taken not to be the fact: *Lord v. Ocean Bank*, 20 Pa. 384; *Com. v. Snyder*, 1 Pa. Superior Ct. 286; *Althouse v. Hunsberger*, 6 Pa. Superior Ct. 160; *Ritter v. Henning*, 10 Pa. Superior Ct. 458; *M. & S. Co. v. Frazier*, 20 Pa. Superior Ct. 394. Moreover, to constitute a withdrawal, there must be notice of it given to a party competent to receive it: see *Real Estate Co. v. Tower*, 161 Mass. 10; 36 N. E. Repr. 680; *Bottle Co. v. Cribbs*, 51 Pa. Superior Ct. 555. Notice of refusal to stand by the subscription may be sufficient if given to the party or agency having charge of the subscriptions: *Real Estate Co. v. Tower*, 161 Mass. 10; 36 N. E. Repr. 680. In these cases that appears to have been the Reading Finance and Securities Company. There is no averment of notice of withdrawal or refusal to pay to it. To say that such notice was given or withdrawal made to the insurance company is not an equivalent. That statement is susceptible of two interpretations—either that the act of withdrawal preceded or that it succeeded the organization of that company. If understood as meaning the former, it is on its face insufficient, because, there being then no such company in existence, no person whatever is indicated as the recipient of the notice, etc., least of all such person as might by the court be deemed a proper one for that purpose. If understood in the other

sense, the statement admits that the withdrawal came too late, and (in the absence of a further averment of its approval by the insurance company after incorporation: see *Harvey v. Weitzenkorn*, 232 Pa. 447, 453) that it was ineffectual. And still less satisfactory, of course, is the allegation of notice, etc., to the insurance company "through" the bank that held the notes for collection, the same not being payable to that company and appearing not yet to have been transferred to it, and the bank not being averred to have had any relation to it or any functions of agency in the premises.

(d) As for any secret conditions annexed to defendants' subscriptions, contingently or absolutely relieving them from liability upon the same, all that need be said is that, if there were any such conditions, they and not the subscriptions were void, and that no such defense can be set up in a suit to recover on them: *Graff v. Railroad Co.*, 31 Pa. 489; *Manufacturing Co. v. Staddon*, 68 Pa. 256; *Miller v. Railroad Co.*, 87 Pa. 95; *Hoffman v. Railroad Co.*, 157 Pa. 174; *Philadelphia & Del. Co. Ry. Co. v. Conway*, 177 Pa. 364; *Marles Carved Moulding Co. v. Stulb*, 215 Pa. 91; *Jeanette Bottle Works v. Schall*, 13 Pa. Superior Ct. 96.

With all the defenses alleged in the affidavits thus eliminated, these cases are in precisely the same situation as the *Rabenhold* case (see preceding case), and it is only for the reason there prevailing that judgment must here also be refused.

In each of the above entitled cases the rule to show cause is discharged.

## DONALDSON, RECEIVER, v. MABRY.

*Stock subscription—Purchase of stock—Affidavit of defense—  
Sufficiency of—Failure of consideration.*

In an action to recover on notes given to secure payment of a purchase of stock, plaintiff's declaration set forth that defendant agreed to buy certain shares of stock from one H., and to secure payment thereof gave his notes to the order of H., which notes were endorsed after maturity to the plaintiff, receiver of the corporation.

The affidavit of defense alleged that the shares purchased were not delivered, that the notes sued upon were endorsed by H. without receiving value, after maturity, and with notice to indorsee of the failure of consideration.

*Held:* The affidavit of defense was sufficient. The transaction here, being a purchase of shares, is quite different from the preceding cases where the contract was for a subscription to stock.

Cf. two cases preceding.

Rule for judgment for want of a sufficient affidavit of defense.  
C. P. Berks Co., March T., 1913, No. 26.

*S. E. Bertolet and William Kerper Stevens*, for plaintiff and rule.

*D. N. Schaeffer*, for defendant.

ENDLICH, P. J.:

In this case the plaintiff's declaration avers that on May 16, 1910, defendant, in writing, agreed to purchase from one Harley fifteen shares of the capital stock of a proposed corporation, The Citizens' Life Insurance Company of America, and to pay therefor to him or his order \$20 per share, defendant at the same time, in accordance with said agreement, giving his notes for \$200 and \$100, respectively, payable, 120 days after date, to the order of Harley, which by endorsement after maturity came into the hands of the plaintiff, who, in the meantime, had been appointed receiver of the insurance company under the Act of June 1, 1911, P. L. 599. The notes being unpaid, plaintiff claims the amount of them, with interest since their maturity. The copies of the contract with Harley, attached to the declaration, show that one of them, for the purchase of five shares, was made between him and one Roy E. Mabry, not the defendant.

The affidavit of defense, as amended by a supplemental one filed since the argument, admits the contracts of purchase from Harley, but avers, *inter alia*, that the latter had subscribed for a large number of shares in the insurance company and given his note in payment of his subscription; that out of this lot of shares subscribed for and owned by him, he sold ten to defendant and five to Roy E. Mabry, to be delivered to them, when issued, upon the incorporation of the company; that it was incorporated on Aug. 19, 1910; that the shares purchased were not issued or delivered to the purchasers; that the notes were endorsed by Harley to the Finance and Securities Company without value, and through its receiver sold to plaintiff for a nominal consideration; and that he, when he took them had full knowledge of the facts recited. There are other averments impeaching the *bona fides* of the incorporation of the insurance company, the validity of its charter, and its continuing corporate existence; but these, as pointed out in the opinion filed this day in *Donaldson, Receiver, v. Rabenhold* (see preceding cases), amount to nothing.

The plaintiff's declaration does not unequivocally allege that, in the transaction with defendant, Harley acted as agent for any one. It adds to the mention of him the words "agent of the Reading Finance and Securities Company." He may have been such in other matters and yet not in this, and the declaration does not so affirm (see *Frazier v. Gery*, 4 Berks Co. L. J. 179, 181), nor does the wording of the written contracts so indicate. The statement of the affidavit of defense, as amended, which for present purposes must be taken as verity, declares him to have been the owner of the shares and to have sold them in that capacity; and the contracts look that way. There is a very substantial distinction between a subscription to shares and a purchase of shares: 1 *Thomps., Corp.*, § 1254. The transaction as averred in this affidavit was not a subscription by defendant to the insurance company stock, to which any of the principles dealt with as peculiar to such in the suits by the same plaintiff against *Rabenhold* or *Rollman and Rentschler* (see preceding cases) are applicable, because not a contract to which other subscribers of stock in the proposed company were parties. Perhaps, since the corporation was not yet in being, and therefore there were no stock and no shares of stock in existence at the time, it was not, strictly

speaking, a purchase of stock by defendant from Harley. Yet, at any rate, it was a purchase from him of part of a right he had acquired as owner by virtue of his subscription to the stock of the insurance company, which right is assignable: see 7 Thomps., Corp., § 8611. Harley was not, in that transaction, representing any one else as agent. He was acting in his own behalf. It was a transaction between him and defendant alone, which in its nature involved no others as privy. True, if the transaction was binding between Harley and defendant, then, as between the latter and the insurance company accepting him as a member in the place, pro tanto, of Harley, a privity of rights and obligations would thereby and thenceforth be established: *Merrimac Mining Co. v. Levy*, 54 Pa. 227. But the possibility of that result depended upon the effect of the sale by Harley to the defendant. If it was not binding or for any lawful reason traceable to its terms became avoided, no relation was created between defendant and the insurance company or any others interested in the same. The allegation is that the contract involved something to be done by Harley, and that his part of it was not carried out; that the consideration on which defendant's obligation under it was based failed, and that, therefore, his liability upon it and upon the notes in suit was discharged. As between Harley and defendant, it is difficult to see why, assuming the facts to be as stated, this conclusion would not follow. The transfer of the notes to the Finance and Securities Company without consideration, as alleged, put it in no better position; and the plaintiff is averred to have taken them, not only after maturity, but with knowledge of the facts. As regards the contracts of purchase, it may be noted that there does not appear to have been any legal assignment of them to anybody. Supposing the transfer of the notes and the possession of the contracts to be enough to show an equitable assignment of them, the rule remains that an assignee can take from his assignor no better title than the latter had, and is subject to all defences available against him: *Real Estate Trust Co. v. Manufacturing Co.*, 223 Pa. 350, 357.

Upon the declaration and affidavits of defense as they stand in this case, there seems, for the reasons stated, to be no present right to judgment, and therefore, the rule to show cause is discharged.

DONALDSON, RECEIVER, v. BODY; SAME v. C. J. MILLER; SAME v. L. A. MILLER.

*Stock subscription—Action to recover—Affidavit of Defense—Sufficiency of—Agreement with agent taking subscriptions.*

In an action to recover on notes given in payment of a subscription to stock, the affidavit of defense filed averred that the agent with whom the defendant dealt agreed to pay for and deliver to the defendant the stock mentioned in his subscription, that the defendant's notes were given in consideration of this promise, and that it was not performed.

*Held:* The affidavit of defense was insufficient.

Cf. the three cases preceding.

Rules for judgment for want of sufficient affidavits of defense. C. P. Berks Co., March T., 1913, Nos. 24, 27 and 32.

*S. E. Bertolet and William Kerper Stevens*, for plaintiff and rules.

*Dumn & Schaeffer*, for Body; *Ira P. Rothermel*, for C. J. Miller and L. A. Miller.

ENDLICH, P. J.:

The declarations filed in these cases, with the copies of instruments accompanying them, disclose, *mutatis mutandis*, the same causes of action as those sued upon in Donaldson, Receiver, v. Rabenhold and Donaldson, Receiver, v. Rollman (see three preceding cases), in both of which cases opinions have this day been filed. The affidavits here put in aver, among other things, that the Reading Finance and Securities Company, with which the defendants dealt, agreed to pay for and deliver to each of the defendants the stock mentioned in their respective subscriptions, that the defendants' notes were given in consideration of this promise, and that it was not performed.

Were these suits brought, like that of Donaldson, Receiver, v. Fisher, C. P. Berks Co., March Term, 1913, No. 21, just decided, simply upon the defendants' notes, the above averments would, here as there, be sufficient to preclude the entry of judgment. But these suits rest, as pointed out in the Rabenhold case, upon causes of action of which written contracts of stock subscription are at least a part, and those contracts are imported into the declara-

tions. Upon them the defendants' liability to pay, if there is any, arises primarily and is complete. The notes may be regarded as but acknowledgments of it: *Forney v. Benedict*, 5 Pa. 225, 228. The contracts themselves are nowhere denied. Yet the transaction is represented as subject to something different injected into it when it came to giving the notes. Passing by the circumstance that it is not stated whether this element was introduced by way of contemporaneous parol agreement, whether it constituted the inducement for defendants' entering into the written contracts or giving notes, and other details indispensable under very familiar principles, it would seem that, in obedience to the rule requiring an agreement set up in an affidavit of defense to be so construed, if possible, as not to contradict the terms of the undisputed instrument sued on (*Da Costa v. O'Rourke*, 12 Philadelphia 223), the matter here averred should be looked upon as something entirely collateral to and apart from the contracts of subscription: see *Thorne v. Worfflein*, 100 Pa. 519, 526; that is to say, as a qualified promise on the part of the Finance and Securities Company to pay for the stock subscribed out of the proceeds of the notes—or perhaps as an absolute assumption by it, in exchange for the notes, to pay the amounts subscribed. In neither aspect does the allegation touch the effect of the subscriptions as contracts between the insurance company and defendants, or afford to the latter an avenue of escape from liability resulting from their undertakings with it and with their fellow subscribers. On the one hand, aside from any other difficulty, the notes remaining unpaid, the Finance and Securities Company could not, of course, have paid for the stock out of their proceeds; and, on the other hand, if there was a bargain that it instead of the subscribers should, provisionally or ultimately, make good the subscriptions, it was, under the authorities, one which cannot help the defendants in these suits. The futility of secret conditions annexed to a subscription for stock in a proposed corporation has been pointed out, with the citation of pertinent decisions, in *Donaldson, Etc., v. Rollman*, ante. And in the opinion filed in that case, together with that in *Donaldson, Etc., v. Rabenhold* (see three preceding cases), will also be found a discussion of each of the remaining defenses here set up sufficient to warrant a dismissal of all of them without further comment.

Thus these cases are left in precisely the same situation, in every essential respect, as those just referred to, and, of course, liable to the same treatment. It follows that, notwithstanding the inadequacy of these affidavits of defense, the propriety of entering judgment for plaintiff here is negatived by the same consideration which forbade it there. Upon that ground, which need not be re-stated,

In each of the above entitled cases the rule to show cause is discharged.



## DONALDSON, RECEIVER, v. BOYER.

*Stock subscriptions—Parties to contract—Affidavit of defense—Sufficiency of—Failure to deny material averments of plaintiff.*

In an action to recover on a subscription for stock, the declaration averred inter alia that the defendant had subscribed for certain shares through H, that H had subscribed for a large block of stock through the R. company, that the R. company was sole agent of the proposed corporation to secure subscriptions to the stock, that H was virtually the agent of the R. company, that the subscription made was subject to the acceptance of the subscriber by the company, and that the notes given in payment for the stock were made to the R. company.

The affidavit of defense averred inter alia that the defendant had not subscribed as an original stockholder but had made a purchase of the stock from H, but it did not deny the above averments of the plaintiff.

*Held:* The affidavit of defense was insufficient.

Rule for judgment for want of sufficient affidavit of defense.  
C. P. Berks Co., May T., 1913, No. 85.

*Samuel E. Bertolet and W. Kerper Stevens*, for plaintiff and rule.

*Ira G. Kutz*, for defendant.

ENDLICH, P. J., Feb. 2, 1914:

The defendant contends that this case is on all fours with Donaldson, Receiver, v. Mabry, (see preceding cases), where a similar rule was discharged. The agreement between defendant and Harley, recited in the declaration, seems, indeed, to be substantially the same in form as that set forth in the case mentioned. But it was there pointed out that the declaration contained no unequivocal allegation of Harley's agency for any one in the transaction, and the notes given were payable to Harley. The transaction could, therefore, be treated only as a sale by Harley to Mabry, which involved no others as privy, and Mabry's defense against Harley was all-sufficient. Here the declaration avers that the Reading Finance and Securities Company was the sole agent of the Citizens' Life Insurance Company to procure and accept subscriptions for its stock; that Harley, under his arrangement with the Finance and Securities Company, which is set out

and bears that interpretation, was, virtually as its agent, selling the insurance company stock, subject to acceptance of the purchasers by the company; and that this was such a transaction, which, being accepted by the company, became in every sense a subscription by defendant to so and so many shares of the stock of the insurance company at such and such a price, and this averment is further supported by the fact that defendant's note for the unpaid price of the stock was made payable to the Finance and Securities Company. The legal principle involved in plaintiff's position, viz., that to the extent of the transfer from Harley to defendant, the latter, expressly promising, as here, to pay the subscription price remaining unpaid, is to be regarded, upon his acceptance by the company, as substituted to the rights and obligations of Harley, and as subject to the liabilities of an original subscriber, is sustained by the decision in *Mining Co. v. Levy*, 54 Pa. 227, 229. The affidavit of defense, as amended by the supplemental affidavit, does not deny the facts alleged, as above indicated, in the declaration; and it should be remembered that the affidavit is made to the declaration, whose averments, not denied, must be taken to be admitted: *Ashman v. Weigley*, 148 Pa. 61, 63; *Wanner v. Emanuel Church*, 174 Pa. 466, 470. It follows that this case is not ruled by the *Mabry* decision, but by totally different considerations applicable to original stock subscriptions.

What those considerations are and how they bear upon the other matters alleged in the defendant's affidavit has been fully passed upon in the various cases arising under this receivership, beginning with *Donalson, Receiver, v. Rabenhold*, (See preceding cases), and referring to the pertinent decisions, and need not be rediscussed. It is enough to say that it is not perceived how anything here averred by way of defense can stand in the way of judgment for plaintiff, or how, therefore, consistently with the authorities which are binding upon us, this application can be refused. It may be noted that there is no denial of the averment of the declaration that the amount for which judgment is asked represents the proportion justly demandable from defendant by the plaintiff in order to wind up the affairs of the insurance company in his hands as receiver.

The rule to show cause is made absolute.

**TANNER, RECEIVER, v. O. M. WEBER CO., INC.*****Mutual insurance company—Legality of assessment—Affidavit of defense—Sufficiency of.***

The presumption of law is in favor of the regularity of proceedings to assess and the legality of the assessment by a mutual insurance company, and this presumption cannot be overcome by a general indefinite denial in an affidavit of defense.

In a mutual insurance company, the membership (becoming a policy holder) estops such member from setting up fraud as to his being induced to become such member, as against innocent third parties who may have regarded his membership as an inducing cause of their becoming members in the company. Accordingly, in the affidavit of defense, there must be a positive averment that no persons have subsequently become members.

Rules for judgment for portions of plaintiffs' claims as to which the affidavits of defense are insufficient. C. P. No. 5, Philadelphia Co., Dec. T., 1913, No. 492, March T., 1914, No. 1056.

*C. J. Hepburn*, for Plaintiffs.

*T. L. Bean, Duane, Morris & Hecksher and W. Y. C. Anderson*, for Defendants.

PER CURIAM, April 21, 1914:

These cases are ruled by the decisions of this court in *Tanner, Receiver, v. H. C. Fox & Sons, Incorporated*, 21 Dist. R. 1030. As was held in that case, the presumption of law is in favor of the regularity of proceedings to assess and the legality of the assessment by a mutual insurance company, and this presumption cannot be overcome by a general indefinite denial in an affidavit of defense. There is no positive denial that there were other persons who had joined the company as innocent third parties subsequently to the membership of the defendant corporation, which fact precludes the defendant setting up fraudulent representations by which it was induced to become a policyholder. In a mutual insurance company, the membership—by becoming a policyholder—estops such member from setting up and claiming fraud as to his being induced to become such member, as against innocent third parties who may have regarded his membership as

the inducing cause of their becoming members in the company. Many of the averments in the affidavit of defense are manifestly assumptions of conclusions not based upon clear and definite premises stated in the affidavit. The plaintiff, as an officer of the court, has no "legal remedies" which are not open to any member of the mutual company, upon proper application to the court, that its officer shall pursue such remedies. A mere general denial that any persons became policyholders of the mutual insurance company because of the membership of the defendant in the company is not sufficient. There must be a positive averment that no persons have subsequently become members of the mutual company. For these reasons and others fully stated in the case, 21 Dist. R. 1030, these rules must be made absolute, viz.: In case No. 492, December Term, 1913, for \$450.94, and in case No. 1056, March Term, 1914, for \$450.75.

COMMONWEALTH V. THE INDEPENDENT REFINING CO., LIMITED.

*Tax on capital stock—Manufacturing companies—Exemption of property used in manufacturing—Act of June 8, 1893, P. L. 353.*

The defendant company, engaged in manufacturing oils, etc., has invested \$56,930 in tank cars which it claims are necessary for the transportation of its products to market. The Commonwealth has settled a tax upon the portion of its capital stock so invested.

*Held:* The said tank cars are a necessary investment, strictly incident and appurtenant to its manufacturing business, and, under the proviso of the Act of June 8, 1893, P. L. 353, the portion of its capital stock invested in them is exempt from taxation.

Appeal from settlement for tax on capital stock. C. P. Dauphin County, No. 171 Commonwealth Docket, 1913.

*Wm. M. Hargest*, Second Deputy Attorney General for the Commonwealth.

*Jas. A. Stranahan*, for Defendant.

KUNKEL, P. J., October 16, 1914:

This is an appeal by the defendant from the settlement of an account against it for tax on its capital stock for the year 1912.

It has been submitted to us for trial without a jury. The facts are not in dispute and we find them to be as follows:

#### FACTS.

The defendant is a limited partnership association organized for and engaged in manufacturing illuminating oils, gasoline and other products out of petroleum. For the purpose of its business it owns and uses sixty-seven tank cars, in which it ships its various products to the market, paying the railroad companies for hauling them to their destinations and returning them to the factory. The cars are differently equipped, so as to be suitable for the particular product intended to be carried in them. One kind of tank cars cannot be used indiscriminately for the different products. The railroad companies have either refused or failed to furnish cars of the character needed, making it necessary for the defendant to supply itself with them. Nearly all its products are shipped and delivered to the market in these tank cars, except a small portion intended for the local trade, which is shipped in wooden barrels. However, the Interstate Commerce Commission prohibits the shipment of gasoline in wooden barrels. The only witness in the case, the manager and treasurer of the company, testified that the cars are just as essential a part of the defendant's plant as the boilers, storage tanks, receiving tanks, pumps or loading racks used to conduct its operations, and that it would be an impossibility to carry on the business without them. This we find to be the fact. The cost of shipping the products to the market in the cars is greater than the cost of shipping them in wooden barrels or in other containers. The Pennsylvania railroad is connected with the defendant's establishment, which is located on the line of that road. The amount of capital stock represented by the investment in the sixty-seven tank cars is \$56,930.

On October 3, 1913, the present settlement was made, in which the defendant was taxed on \$65,875 of its capital stock, the tax thereon amounting to \$329.37. In this amount of capital stock was included \$56,930, representing the investment in the tank cars. The defendant paid \$44.72 on the settlement, but claiming that as it was a manufacturing company it was not liable on the capital stock so invested, took this appeal.

## DISCUSSION.

The sole question presented is whether or not so much of the capital stock of the defendant company as is represented by the tank cars is subject to the tax imposed by the Act of June 1, 1889, amended June 8, 1891, supplemented June 8, 1893, P. L. 353. It appears that the tank cars are used by the defendant for the purpose of delivering its manufactured products to the market, and that its business could not be conducted without them. They are hauled by the railroad companies over their lines and by this means the defendant delivers its products to its customers. We can see no real difference between this method of delivering its products and that of delivering by horses and carts or by other vehicles. If the defendant invested its capital in purchasing the latter means to haul its manufactured products to its customers, it would be deemed a necessary investment, and strictly incident and appurtenant to its manufacturing business. The right to sell its products in the open market is a necessary incident to the right to manufacture, and the right to sell includes the right to deliver or cause to be delivered to those who purchase. Without the sale and delivery of its products the business of the defendant could not be carried on. It is quite clear, therefore, that the part of the defendant's capital stock represented by the tank cars falls within the proviso of the Act of June 8, 1893, which exempts from taxation so much of a manufacturing company's capital stock as is invested in and actually and exclusively employed in carrying on its manufacturing business.

## CONCLUSIONS OF LAW.

Wherefore we conclude:

1. That the capital stock referred to is exempt from the capital stock tax by the proviso of the Act of June 8, 1893.
2. That the defendant is not liable to the Commonwealth on that item of the account settled against it.

Wherefore judgment is directed to be entered against the Commonwealth and in favor of the defendant, unless exceptions be filed within the time limited by law.

**COMMONWEALTH V. PITTSBURGH FIRE INSURANCE CO.**

*Bonus on increase of capital stock—Special charter exempting company from payment of—Charter rights—Act of May 3, 1899, P. L. 190.*

The defendant corporation was incorporated by special act of the legislature and was authorized to have a capital stock of \$300,000 without payment of bonus thereon. The Commonwealth made a settlement for bonus upon an increase of its capital stock made in 1910 from \$100,000 to \$200,000, insisting that the corporation, by accepting the Constitution of 1874 and the provisions of the Act of May 1, 1876, P. L. 53, became liable for bonus under the Act of May 3, 1899, P. L. 190.

*Held:* The right of the defendant to have a capitalization of \$300,000 without the payment of bonus thereon is a charter right with which no legislation can interfere, and defendant is not liable for bonus on an increase of its capital stock within that amount.

**FACTS.**

For the purposes of this case the plaintiff and the defendant admit the following facts, both parties reserving all objections to the relevancy or materiality of the facts so admitted:

1. The Pittsburgh Fire Insurance Company was incorporated by the Act of February 10, 1851, P. L. 35, with the right to have capital stock to the amount of \$100,000, without the payment of bonus. By the Act of March 27, 1854, P. L. 217, the company was authorized to change its name, to increase the number of directors and to increase its capital stock to any amount not exceeding \$300,000, without the payment of bonus. By the Act of February 18, 1859, P. L. 76, the company was authorized to change its name.

2. The stockholders of the Pittsburgh Fire Insurance Company, at a meeting held the eighth day of February, 1910, passed resolutions accepting the provisions of the constitution and agreeing to be subject to the provisions of the Insurance Act of May 1, 1876.

3. On February 8, 1910, the stockholders of the Pittsburgh Fire Insurance Company voted to increase its capital stock from \$100,000 to \$200,000.

4. On January 2, 1911, the treasurer of the Pittsburgh Fire Insurance Company filed a return with the Secretary of the Com-

monwealth showing that an increase of \$100,000 in the capital stock of said company had been issued.

5. On January 19, 1911, the Auditor General and State Treasurer settled and entered a bonus account against the Pittsburgh Fire Insurance Company upon an increase of capital stock from \$100,000 to \$200,000, under the Act of May 1, 1868, P. L. 108, and the supplements thereto.

6. On March 16, 1911, the Pittsburgh Fire Insurance Company filed its appeal from the bonus settlement made against it on January 19, 1911.

Appeal from settlement for bonus on capital stock. C. P. Dauphin County, No. 30 Commonwealth Docket, 1911.

*Wm. M. Hargest*, Second Deputy Attorney General, for the Commonwealth.

*Homer Shoemaker*, for Defendant.

KUNKEL, P. J., September 26, 1914:

This is an appeal by the defendant company from a settlement made against it by the accounting officers of the Commonwealth, in which it is charged with a bonus of \$333.34 on an alleged increase of capital stock. The case has been submitted to us for trial without a jury, and the facts have been agreed upon by the parties in a written statement, which has been filed in the case.

#### DISCUSSION.

The defendant denies its liability for the bonus and contends that its position is supported by *Com. v. R. R. Co.*, 207 Pa. 154. The Commonwealth claims that the question of its liability is ruled by *Com. v. Independence Trust Co.*, 233 Pa. 92. In the former case, the Act of May 3, 1899, P. L. 190, under which the bonus is charged in this case, was held not to apply to that company. The capital stock which it issued did not exceed the amount which it was authorized to have, and it was held that it was not liable for bonus. In the latter case, the right of the Commonwealth to bonus was conceded and the only question presented for determination was that of the rate of bonus which it should pay. We are of the opinion that the question presented



is ruled by the former case, so far as that case is applicable to the present one.

The defendant company, by the Acts of Assembly under which it was organized and under which its name was changed, was authorized to have a capital stock of \$300,000 without the payment of bonus. Originally it issued capital stock to the amount of \$100,000, and subsequently, on February 8, 1910, it voted what it called an increase in its capital stock of \$100,000, making a total paid-in capital of \$200,000, an amount still within the limits of its authorized capital. Upon the latter \$100,000 the bonus is claimed by the Commonwealth. We do not understand that this action of the defendant company was an increase of its capital stock within the meaning of the statutes relating to the payment of bonus. The increase means an increase over the authorized capital stock. Section 2, Act of May 3, 1899, P. L. 190. The defendant's authorized capital stock was \$300,000, and this amount it was entitled to have without the payment of bonus. When it shall exceed this amount then the defendant may be said to have increased its capital stock and upon such increase it will be chargeable with the bonus prescribed by law.

The Commonwealth suggests that by accepting the Constitution of 1874 and the provisions of the Insurance Act of May 1, 1876, P. L. 53, the defendant company became subject to the legislation relating to bonus. We have not been shown by what authority or by what method the acceptance was accomplished, and we are therefore not prepared to say that it had the effect which the Commonwealth claims. The right to have a capitalization of \$300,000 without the payment of bonus is a charter right with which no legislation can lawfully interfere. *Com. v. Erie & Western Transportation Co.*, 107 Pa. 112. And there is nothing before us to show that the defendant in any way voluntarily surrendered it.

#### CONCLUSIONS OF LAW.

We therefore conclude:

1. That the defendant is not chargeable with bonus on the \$100,000 of capital which it issued under its charter.

2. That the defendant is entitled to judgment.

Wherefore judgment is directed to be entered in favor of the defendant and against the Commonwealth unless exceptions be filed within the time limited by law.

## PUBLIC SERVICE COMMISSION

W. R. GRUBB, ET AL., V. BANGOR ELECTRIC LIGHT, HEAT & POWER  
Co., ET AL.

*Charter powers—Denial of—Refusal to exercise—Duty of two  
companies to co-operate in a service to the public.*

The Bangor Electric Light, Heat and Power Co. was incorporated with power to furnish heat and electric light to persons in the Borough of Bangor. It, and its successors, supplied steam to the complainants, many of whom have in their homes and places of business no other facilities for supplying heat. The said company, by conveyances and mergers came into the hands of the Pennsylvania Utilities Company which held the producing plant but sold the distributing plant to the Bangor Steam Heating Company. These companies now refuse to furnish heat, contending that in reality neither they nor their predecessors have any right under their charter to do so.

*Held:* (1) The defendants should continue to supply heat as heretofore. When the power to supply public service is expressly granted in a charter and is exercised for a long period the Commission will not look beyond the charter but will leave any question as to the legality of the charter provisions to be settled by the courts.

(2) The fact that the distributing and producing facilities are owned by different corporations will not relieve them from their duty to the public. They must act together in the discharge of that duty.

### COMPLAINT DOCKET No. 285.

#### Report and Order of the Commission.

Submitted Sept. 26, 1914.

Decided Oct. 8, 1914.

#### COMMISSIONER PENNYPACKER:

This is a case of importance, which has been considered with such care as time allowed, but since it involves the cutting off of the supply of heat to the citizens of a borough and since cold weather may any day overtake them, it is important that it should be decided without delay. Fortunately the Commission has had the benefit of full and able arguments by counsel. The essential facts are as follows:

The Bangor Electric Light, Heat and Power Company was incorporated in 1894, with power to furnish electric light and also

heat to the Borough of Bangor. In 1902, having secured the right, by consent of the borough, to lay mains and pipes through the streets, it began to supply heat to the complainants in their houses and places of business. The corporation had a plant with four boilers in Bangor where it generated electricity and the steam heat was chiefly, if not entirely, the exhaust steam from the engines driven by the steam from these boilers. It sought the business of the complainants and placed branch pipes running through their properties and into their cellars, which pipes were paid for in certain proportions by the corporation and the complainants. Many of the houses, because of the statements of agents of the corporation and of dependence upon this source of supply, were erected without other facilities for furnishing heat.

In 1910 the Bangor Electric Light, Heat and Power Company sold its plant and franchises to the Eastern Pennsylvania Power Company, and this latter corporation became merged, in 1913, into the Pennsylvania Utilities Company. During the time of its separate ownership of the plant, the Eastern Pennsylvania Power Company continued to furnish the steam heat. The Pennsylvania Utilities Company, a corporation with many affiliations and whose operations cover a considerable extent of territory, erected a plant for generating electricity at Easton, about seventeen miles from Bangor. It caused the incorporation of the Bangor Steam Heating Company and sold to it the distributing system at Bangor, but retained the ownership of the generating plant there. The Bangor Steam Heating Company supplied steam heat to the complainants from the fall of 1913 until May, 1914. The Pennsylvania Utilities Company, about this time, removed one of the four boilers at Bangor to be used elsewhere. In May, of 1914, the steam heat was turned off, after notice, and a further supply is refused. The mains remain in the streets and the branch pipes remain on the properties of the complainants.

It may be reasonably assumed that by these successive conveyances and mergers, the rights, properties and franchises of the Bangor Electric Light, Heat and Power Company, with the corresponding duties and obligations to the public, became vested in the Pennsylvania Utilities Company. The contention of the defendants is, however, that under the acts of assembly authorizing

its incorporation the Bangor Electric Light, Heat and Power Company and each of the later corporations have no power to supply steam heat. Without determining the question whether any corporation, without special authority, may not engage to sell its waste products such as exhaust steam, it is sufficient to point out that a corporation ought not to be permitted to set up for its own advantage a lack of power to perform an obligation to a consumer which it has voluntarily assumed and upon which the consumer has expended moneys and for which he has given up rights of property. Nor will the Commission, in such a case, be astute to look beyond the plain words of the charter granting the power to supply heat. Such questions can, with more propriety, be raised in a proper proceeding in a court, where they can be determined with certainty. For the purpose of the present inquiry, the Commission will assume that the officials of the Commonwealth charged with the duty of supervising the issuing of charters properly performed those duties. While the Commission, perhaps, ought not to close its eyes to a plain violation of law appearing in a charter, in the present case the power was expressly granted and was exercised by each of the corporations in succession, through altogether a period of twelve years.

We are of the opinion that it was the duty of the Pennsylvania Utilities Company, after the merger of the Eastern Pennsylvania Power Company, to continue to supply steam heat to the complainants. By its sale of the distributing facilities to the Bangor Steam Heating Company it became practically and physically impossible for either corporation, alone, to supply the steam heat, that is to say, the one corporation had no source or means of supply and the other no way of distributing steam heat to the consumer. A public duty cannot be escaped in this way. For the purpose of this supply and the obligation to the consumer, the two corporations may still be regarded as a single entity. The duty is mutual and each must perform its part. The Pennsylvania Utilities Company and the Bangor Steam Heating Company ought together to be required to continue the supply of steam heat to the complainants and an order will be issued accordingly.

## ORDER.

This case being at issue, upon complaint and answer on file, and having been duly heard and submitted by the parties, and investigation of the matters and things involved having been had, and the Commission having, on the date hereof, submitted and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

Now, to-wit, October 8, 1914, *It is ordered:* That the Bangor Steam Heating Company and the Pennsylvania Utilities Company shall, from the date of this order, furnish steam heat to the complainants and all other consumers or users of such steam heat within the Borough of Bangor, as heretofore.

By the Commission,  
F. M. WALLACE, *Acting Chairman.*

## BOROUGH OF BUTLER'S PETITION. (REHEARING.)

NOTE: For the opinion of the Commission on the original hearing, see 2 P. C. R. 65.

*The petition of the Pittsburgh, Bessemer & Lake Erie Railroad Company and the Bessemer and Lake Erie Railroad Company for a rehearing of the petition of the Borough of Butler for the issuance of a Certificate of Public Convenience approving the location and erection of a viaduct in the Borough over the tracks and facilities of the Baltimore & Ohio Railroad Company and the Bessemer & Lake Erie Railroad Company, and the apportioning the cost of construction of such viaduct.*

## APPLICATION DOCKET NO. 1.

Submitted August 4, 1914.

Decided Oct. 9, 1914.

Report and Order to the Commission.

## COMMISSIONER PENNYPACKER:

After a careful consideration of the matters urged at the rehearing upon the application of the Pittsburgh, Bessemer & Lake Erie Railroad Co. and the Bessemer & Lake Erie Railroad Co., the Commission sees no reason to change the conclusions reached

in the opinion heretofore filed (2 P. C. R. 65) upon which the Certificate of Public Convenience was issued, and the action taken is affirmed. With respect to the determination of the proportion of damages, these railroads, through counsel, submitted themselves to the determination of the Commission in the answer filed and at the hearings (p. 89 of testimony) and offered no evidence.

Permission is given the Borough of Butler, as requested, to withdraw its petition.

**ORDER.**

This matter having come on to be heard on petition praying for a re-hearing, and the Commission having considered the same, and filed its report containing its conclusions thereon, which report is hereby referred to and made a part hereof;

*Now, therefore, this ninth day of October, 1914, It is ordered,* That the prayer of the petition of the Pittsburgh, Bessemer & Lake Erie Railroad Company and the Bessemer & Lake Erie Railroad Company be and the same is hereby refused.

By the Commission,  
F. M. WALLACE, *Acting Chairman.*

CHARLES L. DALLAS, ET AL., V. PENNSYLVANIA RAILROAD  
COMPANY.

*Adequate service at stations—Agency and non-agency stations.*

Complainant alleged that the service at the station at Wolfsburg, Bedford County, was unsatisfactory. The evidence showed that the defendant had provided a caretaker to look after freight in- and out-bound, that shipments could be sent "freight collect" to said station and sent prepaid from it. A waiting room, adequately heated had also been provided. The defendant contends that the traffic at said point is insufficient to support a regular agency station.

*Held:* The complaint should be dismissed.

COMPLAINT DOCKET NO. 197—1914.

Report and Order of the Commission.

Submitted April 9, 1914.

Decided October 6, 1914.

WALLACE, COMMISSIONER:

This complaint was brought forth by the action of the Pennsylvania Railroad Company in changing the character of its station at Wolfsburg, Bedford County, Pennsylvania, from an Agency Station to a Non-agency Station, but it appears from the evidence that a misunderstanding existed as to the exact character of the change to be made as will appear in this opinion.

It was the belief on the part of the complainant that the station was to be closed, that no accommodations were to be provided for the traveling public, that in case a shipment was to go forward from Wolfsburg no receipt would be issued by the railroad, nor could the same be prepaid, that all inbound freight would of necessity be prepaid or refused for this point. From evidence, and the same was admitted as correct by the complainant, there is now a caretaker who will have charge of both the passenger and freight station; the passenger station to be open for all passengers and to be heated during cold weather and, while no tickets are to be sold at Wolfsburg, passengers will pay conductor on train without any additional cost, and baggage would be checked upon the train. The freight station is in charge of the same caretaker who receives freight from any train consigned to this point and places same within the freight room, safe from the



elements, and also receives all freight for outbound shipment (accepting payment therefor if shipper desires to prepay freight charges) and issuing freight receipt for same signed by agent at Bedford.

It is not necessary for any resident of Wolfsburg to go to Bedford or Man's Choice to learn the freight charge as the caretaker can and will furnish information covering such matter and in addition a telephone is provided by the railroad for free use of shipper and travelling public when there is any question as to rates or tariff.

The income from the station at Wolfsburg, according to reports which are a part of this proceeding, is not of sufficient size to justify the railroad in maintaining a regular agent and apparently the only cause for complaint is the inability to receive inbound freight unless the charges had been prepaid by shipper.

Taking the entire matter into consideration I believe the Pennsylvania Railroad Company is performing its function and giving reasonable service to its patrons at Wolfsburg and I, therefore, recommend that the complaint be dismissed.

**ORDER.**

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

*Now, to-wit, Oct. 6, 1914, It is ordered:* That the complaint in this proceeding be and it is hereby dismissed.

By the Commission.

**F. M. WALLACE, Acting Chairman.**

## ATTORNEY GENERAL

## IN RE INCORPORATION OF WATER COMPANY.

*Water companies—Incorporation of—"District" in which water is supplied—Act of April 29, 1874, P. L. 73.*

There is no authority in the Act of April 29, 1874, P. L. 73, or any of its supplements, for the incorporation of a water company to supply water in a district composed of parts of two townships.

August 12, 1914.

*Hon. Thomas J. Lynch, Secretary, State Water Supply Commission, Harrisburg, Pa.*

SIR:

Sometime ago you left with this department the application of the Geigertown Water Company for a charter, and asked its opinion as to whether the purpose was one within the terms of the Act of April 29, 1874, P. L. 73, and its supplements. The purpose stated in the charter is

"Supplying water to the public in the town of Geigertown, a district comprised of a section of the eastern part of the township of Robeson and of an adjoining section of the western part of the township of Union in the County of Berks, and State of Pennsylvania; and the two sections taken together as one district do not exceed in area nine square miles."

The Act of 29 April, 1874, P. L. 73, provides in section 2, paragraph 9, that corporations may be formed for the supply of water to the public. The application in question evidently is intended to come within this paragraph.

Section 34 of the same Act, clause 2, provides:

"Where such company shall be incorporated for the supply of water, they shall have power to provide, erect and maintain all works and machinery necessary or proper for the raising and introducing into the town, borough, city or district where they may be located, a sufficient supply of pure water."

The Act of May 16, 1889, P. L. 226, extended the Act of 1874, so as to provide for the incorporation of companies to supply storage or transportation of water and water power for commercial and manufacturing purposes.

Even in the absence of judicial construction, it would seem clear that the Act of 1874 limited the power of water companies to provide water, to the "town, borough, city or district where they may be located."

The Supreme Court has decided that this was the intention of the Legislature, saying, per Mr. Justice MESTREZAT, in *Bly v. White Deer Mountain Water Company*, 197 Pa. 80 (1900):

"The Act provides that water companies incorporated under its provisions shall have the power to supply water in the 'town, borough, city or district where they may be located.' This language clearly and expressly limits the authority of a water company to the municipal or quasi-municipal division in which it is located."

Does the application of the Geigertown Water Company limit the territory within which it is proposed to supply water to a "town, borough, city or district"? It is evident that the purpose is not to limit the activity of the company to the town of Geigertown, if there is such a town, because, the application proceeds to define the district where the water is to be supplied, as consisting of sections of two adjoining townships, and the advertisement of the notice of the application for a charter for the water company declared that its purpose was to supply water to the public in "the village of Geigertown."

The question, therefore, is whether the Act of 1874 permits the incorporation of a company to supply water to a district consisting of parts of two townships. In other words, can such territory be considered a "district"? It is not a subdivision of the territory of the State to which any legal term may be applied. A "district" if used in a loose sense has no definite limit. It may embrace all or part of one or any greater number of townships, counties or even states. Obviously it was not intended to have any such unrestricted meaning, when used in the Act of 1874, and the Supreme Court has so held in *Bly v. White Deer Mountain Co.*, *Supra.*, saying, per Mr. Justice MESTREZAT:

"The word 'district' used in the Act, having no qualifying adjective to indicate its extent or meaning, is not to be construed as extending the territorial limits in which the corporation may supply water beyond those given it by the prior words used in that connection. It may embrace a township or a part of one of the political divisions mentioned immediately preceding it, but not *two or more of them.*" (Italics ours.)

You, therefore, are advised that there is no authority for the incorporation of a water company to supply water in a district composed of parts of two townships, and since the application of Geigertown Water Company indicates that the purpose of the corporation is to supply water in such a territory, it should not be approved.

Very truly yours,

MORRIS WOLF, *Third Deputy Attorney General.*

**PUBLIC SERVICE COMMISSION.****YORK WATER COMPANY v. CITY OF YORK.**

*The petition of the York Water Company for process to prevent the City of York from violating the provisions of The Public Service Company Law, by restraining her from enforcing her ordinance to compel the petitioner to install a meter service for one class of its patrons or customers, and to regulate its rates.*

*Request of public service company to restrain enforcement of city ordinance. Act of July 26, 1913, Art. VI, Sec. 34, P. L. 1430.*

The council of the City of York passed an ordinance requiring the petitioner to install water meters for consumers at its own expense. The petitioner requests the Commission to call upon the Attorney General to restrain the enforcement of the said ordinance by the city.

*Held:* The Public Service Company Law does not give the Commission power to supervise or control municipal legislation or its consequences. If the council in passing the ordinance exceeded its powers the remedy for the petitioner is in the courts. The passage of the ordinance is not a "violation of this act" within the meaning of Art. VI, Sec. 34, P. L. 1430.

APPLICATION DOCKET NO. 212, 1914.

Report and Order of the Commission.

Submitted July 10, 1914.

Decided October 9, 1914.

**COMMISSIONER PENNYPACKER:**

The council of the City of York, February 27, 1914, passed an ordinance requiring that the York Water Company, its successors and assigns, whenever requested so to do in writing by any consumer of water within the City of York, shall install at its own expense and maintain thereafter without any further charge or expense to the consumer, a meter for the measuring of the quantity of water used or consumed, and to base its charges or rates therefor in the manner prescribed by law.

The mayor of the city approved the ordinance and a later amendment. Thereupon the York Water Company filed with the Commission, July 10, 1914, its petition praying that the Commis-

sion "will request the attorney general of this Commonwealth pursuant to the provisions of Section 34 of Article 6 of The Public Service Company Law to proceed in the name of the Commonwealth by injunction or other appropriate remedy at law or in equity to restrain the City of York, its officers, council and employees from enforcing the provisions of the said ordinances heretofore recited."

Many of the propositions urged in the able argument of counsel for the petitioner may be admitted, to wit: That it was the intention of the legislature to place in The Public Service Commission the control of the service and facilities of water companies; that it would be difficult for the water company to obey two different authorities; that the Commission has the power to require the installation of meters; that obedience to the ordinance would result in discrimination; that the Act of July 26, 1913 repealed the Act of June 27, 1913; and that the Act of June 27, 1913, is unconstitutional. Assuming all of these statements of law to be correct, the inquiry still arises as to where the Commission derives its authority, or where the duty is imposed upon it, to ask the attorney general to restrain municipalities from the passage and enforcement of ordinances, even though they be contrary to the law. The Act of July 26, 1913, gives to the Commission the power to supervise contracts between municipal corporations and public service companies, and prevents those corporations from constructing plants for public service without the approval of the Commission, but nowhere is there given power to the Commission to supervise or control municipal legislation or its consequences. There is no such violation of the Public Service Act as the attorney general could be asked to restrain. The municipal authorities are the representatives of the people in their local affairs. This Commission ought not to assume any control over the officers of the municipalities in the performance of duties imposed upon them by municipal authority, unless it appears with sufficient clearness that this is the meaning and intention of the legislation conferring its powers. If the Commission were to undertake to restrain municipalities in every instance where there is the possibility of infringement upon the authority of the Commission, its jurisdiction would be indefinitely extended. If, as is con-

tended, the ordinances of the borough are in conflict with the law, it is the not unusual case of a wrong committed for the redress of which the Courts are always open. In its inception the effort may be restrained, and if consummated, damages may be awarded.

For these reasons the petition must be dismissed.

ORDER.

This case being at issue upon petition filed and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof.

Now, to wit: October 9, 1914, *it is ordered*, that the petition in this proceeding be and it is hereby dismissed..

By the Commission,  
FRANK M. WALLACE, *Acting Chairman*.

THE GOOD SHEPHERD HOME v. LEHIGH VALLEY LIGHT &  
POWER CO.

*Rates—Discrimination—Deviation from published tariffs and  
schedules*

The complainant alleges that the respondent refused to accept tender of payment of and allow discount on bills for lighting by reason of the fact that complainant had refused to pay bills for power which had been rendered in accordance with the tariffs and schedules filed by the respondent.

*Held:* The respondent was justified in so doing as its refusal was in accordance with its tariffs and schedules filed. Any deviation from the rates or regulations filed by a public service company is discriminatory and illegal unless the same is made to all under similar circumstances and conditions.

COMPLAINT DOCKET, No. 276.

Report and Order of the Commission.

Submitted August 25, 1914.

Decided October 6, 1914.

COMMISSIONER BRECHT:

From the facts as substantially set forth by complainant and

respondent in their respective communications in re *The Good Shepherd Home v. Lehigh Valley Light and Power Company*, it appears that complainant has been charged the regular rates in the published tariff of respondent for current furnished to operate its laundry; that the method pursued by respondent in refusing to accept tender of payment for complainant's bills of lighting each month by reason of the fact that complainant had refused to pay its bills for power furnished, is in accordance with a provision under respondent's general rules and regulations to furnish current, to wit:

"The discount for prompt payment, as provided in the schedules, is allowed only on bills paid on or before the 15th of the month. Attention is called to requirements of the law which prohibit allowance of this discount on all bills not paid by the 15th.";

that the practice of supplying complainant Tungsten lamps free of charge was a special concession extended to *The Good Shepherd Home* and apparently not allowed in the case of other consumers.

There were no facts submitted in the correspondence which tend to show that a contract of any kind was made with complainant providing for a special rate, or a fixed sum to be charged by the year, for the consumption of power in its laundry. Copies of the unpaid bills furnished by respondent show that the *Good Shepherd Home* was charged for power the regular rates as published. To have been charged a lower rate than the regularly published rate would have been illegal, since it would be making an unfair discrimination in the rates charged different consumers for the same service rendered. A lower rate could not be justified under the act unless the same terms and rates were granted to all other consumers who might properly be placed in the same general category as complainant.

That a classification of the patrons of respondent might be made to advantage for this purpose does not appear from the facts submitted in the complaint. Consequently the Commission is not warranted in making a recommendation requiring respondent to classify its patrons and service, or change its schedules of



rates, or modify the rules and regulations under which it is collecting its bills.

Similarly there is no reason apparent why under existing conditions Tungsten lamps should be furnished free to complainant unless such equipment is also supplied free of cost to all other consumers. It is the opinion of the Commission, therefore, that the complaint ought to be dismissed without recommendation.

ORDER.

This case being at issue upon complaint and answer on file, and having been duly submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof.

Now, to wit: October 6, 1914, it is *ordered*, that the complaint in this proceeding be and it is hereby dismissed.

By the Commission,  
FRANK M. WALLACE, *Acting Chairman*.

JOSEPH CAUFFIEL, ET AL., v. CITIZENS LIGHT, HEAT & POWER CO.

*Regulation requiring deposit by consumer before installation of service—Minimum rate—Reasonableness of.*

The regulation of an electric light company requiring customers who are not property owners or who have not in some manner shown their ability to pay for service to deposit \$5.00 before the installation of service, is a reasonable regulation.

A minimum monthly charge of \$1.00 for electric service is reasonable.

COMPLAINT DOCKET No. 237.

Report and Order of the Commission.

Submitted June 17, 1914.

Decided October 6, 1914.

By THE COMMISSION:

Joseph Cauffiel, on behalf of certain citizens of Johnstown, complained to the Commission that the practice of the Citizens Light, Heat and Power Company of requiring from certain customers a deposit of five dollars (\$5.00) before installing service

was unjust and unreasonable, and also that the minimum monthly charge of said company of one dollar (\$1.00) was unjust and unreasonable.

A hearing on this complaint was held by the Commission and from the testimony produced by both the complainant and the respondent it appears to the Commission that the deposit of five dollars is required of prospective customers of the company who are not property owners, or who have not in some manner shown to the company their ability to pay for the service which they desire. This practice is one in very general use in the Commonwealth and does not appear to the Commission to be either unjust or unreasonable.

In regard to the minimum monthly charge of one dollar, the testimony shows that this charge is an increase over a minimum charge formerly made by the company but that it is not more than is reasonably required to meet the expenses necessarily incurred by the company to place it in a position to be ready to serve the customers, nor is it more than the usual charge for such service.

It is therefore the opinion of the Commission that the complaint in this case should be dismissed and an order will be so drawn.

#### ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof.

Now, to wit: October 6, 1914, *it is ordered*, that the complaint in this proceeding be and it is hereby dismissed.

By the Commission,

FRANK M. WALLACE, *Acting Chairman.*

PETITION OF PHOENIXVILLE, VALLEY FORGE & STRAFFORD ELECTRIC RAILWAY COMPANY.

PROTEST OF POTTSTOWN & PHOENIXVILLE RAILWAY COMPANY.

*The petition of the Phoenixville, Valley Forge & Strafford Electric Railway Company for the approval of an Ordinance Contract granting to the Company the right to construct, operate and maintain its line of railway on certain streets in the Borough of Phoenixville.*

*Approval of ordinance contract—Public necessity—Evidence of—Conditions of operation prescribed at crossing.*

The petitioner seeks approval of an ordinance contract granting it the right to extend its line over certain streets in the Borough of Phoenixville. The proposed line will furnish trolley service to sections of the borough heretofore without such service. The ordinance has been approved by nine of the twelve councilmen. The terms of the ordinance sufficiently protect the interests of the borough, but protests have been filed by certain citizens and by another trolley company averring that there is no public necessity for the extension.

At one point the proposed extension runs along the crest of an elevation toward and from which the cars of the protesting company must ascend and descend.

*Held:* (1) A Certificate of Public Convenience should issue. The Commission, in determining questions which affect the interests of municipalities, gives much weight to the conclusions reached by their official representatives charged with the duty of protecting those interests. The evidence here shows a public necessity.

(2) The cars of the petitioner shall come to a full stop before crossing the tracks of the protestant at the above-mentioned point of crossing.

MUNICIPAL CONTRACT DOCKET NO. 180, 1914.

Report and Order of the Commission.

Submitted June 29, 1914.

Decided October 9, 1914.

COMMISSIONER PENNYPACKER:

The petitioning corporation was incorporated December 15, 1909, under the provisions of the Act of May 14, 1889, with the right to construct an electric railway between the Borough of Phoenixville and Valley Forge. Its line of railway is now con-

structed and in operation from Valley Forge to the suburbs of Phoenixville and between June 30, 1913, and June 30, 1914, it carried 27,018 passengers. To a large extent its patronage is given by travellers who get off from the main line of the Philadelphia & Reading Railway at Phoenixville, a borough having nearly 12,000 inhabitants, and go from there to the state camp grounds and park at Valley Forge. It is a well constructed road, about two-thirds of which is ballasted with stone. Its present terminus is at the corner of Nutts avenue and Main street, on the southern outskirts of the borough. From this point the track of the Pottstown & Phoenixville Railway Company runs northward upon Main street and westward upon Bridge street through the center of the borough. For some time the petitioner had a traffic agreement with this railway for the use of the track from Nutts avenue to Bridge street, but it led to disputes over the division of the fares and the use of the track and was abandoned. An agreement was made to submit these disputes to a board of three arbitrators, but these arbitrators failed to follow the terms of the agreement and their award was not accepted.

An ordinance was passed by the councils of the borough and approved by the burgess June 11, 1914, which gave permission to the petitioner to construct and operate a single track railway. Beginning at the terminus of the company's line of railway at the intersection of Nutts avenue with Main street and extending westwardly on Nutts avenue to its intersection with Gay street, thence northwardly on Gay Street to its intersection with Church street, thence eastwardly on Church street to its intersection with Starr street, thence northwardly on Starr street to the track of the Pickering Valley Railroad, situated on the south side of Bridge street. The other terms of this ordinance appear to have been drawn with sufficient care for the interests of the borough. The proposed route passes the hospital, six schools, seven or eight churches, comes approximately near the cemetery and the station of the Pennsylvania Railroad, and would to a certain extent accommodate the persons who may wish to go to any of them. Its terminus is within about a block of the depot of the Philadelphia & Reading Railway, and as near to that depot as under existing conditions is feasible. The route was selected

by the council of the borough and met the approval of nine of the twelve councilmen.

The Commission in determining questions which affect the interests of municipalities, gives much weight to the conclusions reached by their official representatives charged with the duty of protecting these interests. The evidence is to the effect that those of the citizens who favor the approval of the ordinance largely preponderate over those in opposition. This route crosses the track of the Pottstown & Phoenixville Railway at Nutts avenue and Main street, and at Church and Main streets, and at the latter runs along the crest of an elevation toward and from which to the northward the cars of the protesting railway company must ascend and descend. If, however, public service is to be rendered, it is impossible to overcome all of the disadvantages which topography presents. In the view of the Commission much of the difficulty can be obviated by making it a condition of approval of the ordinance, that all of the cars of the petitioner shall come to a full stop on Church street west of Main street before crossing. A number of citizens filed remonstrances upon the ground of a lack of public necessity for the proposed extension, but it is the opinion of the Commission that the railway, if so extended, will serve the needs of many of the people of Phoenixville, residing upon Nutts avenue, Gay street and the western part of the borough in getting to the depot of the Philadelphia & Reading Railway Company, as well as visitors to the Valley Forge Park and those living in the intervening territory.

This accommodation cannot be so well given by using the track of the Pottstown & Phoenixville Railway Company from Nutts avenue to Bridge street. The plan and evidence submitted are both imperfect in failing to show the exact distance from Starr street to the depot of the Philadelphia & Reading Railway Company, the width of Starr street, and the distance from Starr street to Main street upon Bridge street, but the last named distance covers a long block and is quite considerable.

An order will, therefore, be issued, approving said ordinance contract, such approval to be evidenced by a Certificate of Public Convenience, and also requiring that the cars of the Phoenixville Valley Forge and Strafford Electric Railway Company shall

come to a full stop on Church street, west of Main street, before crossing the tracks of the Pottstown & Phoenixville Railway Company.

ORDER.

This case being at issue upon petition and answer filed and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof.

*Now, to wit: October 9, 1914, it is ordered, (1) That a Certificate of Public Convenience be issued evidencing the Commission's approval of said ordinance contract. (2) That all cars of the Phoenixville, Valley Forge & Strafford Electric Railway Company shall come to a full stop on Church street west of Main street before crossing the tracks of the Pottstown & Phoenixville Railway Company.*

By the Commission,  
FRANK M. WALLACE, *Acting Chairman.*

S. HERMAN ZOOK *v.* WEST KISHACOQUILLAS TURNPIKE ROAD CO.

*Turnpike companies—Maintenance of roadbed—Rates—Rates for automobiles—Acts of Jan. 26, 1849, P. L. 10, and March 18, 1868, P. L. 381.*

Complainant alleges that the roadbed of the respondent company is not properly maintained, and that the tolls charged are unjust and unreasonable.

The evidence shows that the roadbed is in poor condition, that "breakers" are used for drainage, and that little money has been spent for maintenance. The evidence showed further that the rates charged were not in excess of those allowed by the Act of January 26th, 1849, P. L. 10, and the Act of March 18th, 1868, P. L. 381, with the possible exception of the charge made for automobiles, which was not fixed by said acts; and that under the said tolls the company received only 2 per cent. per annum on its investment.

*Held:* (1) The company should at once repair its roadbed, and, in the future, properly maintain it.

(2) Under the circumstances the tolls charged are just and reasonable.

(3) A rate of toll for automobiles which is higher than the rate for horse drawn vehicles is reasonable, for automobiles require that the highways be in better condition and the cost of repair and maintenance is consequently increased.

#### COMPLAINT DOCKET No. 249, 1914.

#### Report and Order of the Commission.

Submitted July 4, 1914.

Decided October 20, 1914.

#### COMMISSIONER TONE:

The complaint of S. Herman Zook against the West Kishacoquillas Turnpike Road Company alleges that the greater portion of the turnpike road of the respondent is out of order and repair, inconvenient and dangerous to public travel, that very little work has been done or material placed on the road for five years, the side ditches are filled up and in many places water stands almost constantly on the road; that the tolls are unjust and unreasonable for the service afforded; and that the respondent is discriminating by demanding and receiving less compensation from some persons than from others.

From the evidence submitted at the hearing the facts found are, that the respondent company under a special act of the legislature enacted in 1853 [April 2, P. L. 282] was incorporated as "The West Kishacoquillas Valley Turnpike Road Company with power to construct a turnpike road from Brown's Mill, on the Kishacoquillas and Bellefonte Turnpike, or Lewistown and Kishacoquillas Turnpike in Mifflin County, by the nearest and best routes, in the opinion of the directors, or a majority of them, as shall be for the interests of the company, to the village of Mill Creek on the Pennsylvania canal and railroad in Brady Township, Huntingdon County, subject to all the provisions and restrictions of an act regulating turnpike and plank road companies approved the 26th day of January, 1849 [P. L. 10] and the several supplements thereto"; that the company proceeded and constructed a turnpike road from a point at or near the Spanogle-Yeager Mill in the village of Reedsville (on the Lewistown and Kishacoquillas Turnpike) for a distance of about four

and one-half miles westerly therefrom to a point opposite the former home of John Garver; that the tolls charged for a round trip over the turnpike, a distance of nine miles, are for a four-wheeled vehicle drawn by one horse, thirteen (13c) cents; for a similar vehicle drawn by two horses, eighteen (18c) cents; for an automobile, twenty-five (25c) cents; that the Act of 1849 regulating turnpike and plank road companies provided that the tolls to be collected should be "for every five miles in length of the said roads completed and licensed as aforesaid, the following sums of money, and so in proportion for any lesser distance. \* \* \* for every chariot, coach, phaeton or dearborn with one horse and four wheels, ten cents; for every coach, phaeton or chaise with two horses and four wheels, twelve cents; for either of the carriages last mentioned with four horses, twenty cents; for every other carriage of pleasure under whatever name it may go, the like sums according to the number of wheels and horses drawing the same"; that an act of the legislature passed in 1868 [March 18, P. L. 381] provided "that the West Kishacoquillas Valley Turnpike Road Company incorporated by the act approved the second day of April, 1853 [P. L. 282] may from time to time, by a vote of the stockholders, at a meeting called for that purpose, increase the rates of toll provided by its act of incorporation, so much as in their opinion may be expedient; provided, that the said tolls shall in no case be increased more than fifty per centum"; that as shown by the testimony of H. R. Reed, who is manager, secretary and treasurer of the company, the capital stock of the company is \$9,500.00, and the receipts and expenditures of the company for the past six years were as follows:

## Expenditures

Year	Receipts	Materials	Hauling	Labor	Taxes	Supt., Etc.
1909, .....	\$701.95	\$53.52	\$131.00	\$35.00	\$22.80	\$84.00
1910, .....	627.94	42.08	114.50	27.00	22.80	76.00
1911, .....	662.50	46.52	15.25	34.30	47.50	229.00
1912, .....	587.18	42.04	41.50	21.50	47.50	230.75
1913, .....	638.10	83.76	122.00	30.00		247.00
1914, 10 mos.,	706.87	244.54	115.50	127.07		90.25



The earnings averaged 2 per cent. per year and two dividends of 6 per cent. each were paid in the six years; that there are numerous places along the road where water accumulates forming mudholes; that the road is not properly ditched and drained; that the use of "breakers" for cross drainage is still continued, although the Act of June 15, 1911, [P. L. 982] prohibits the same; that the hand or guard rail on the approach to a bridge near the "woolen mill" is not secure nor substantial; that at the east end of said bridge the surface of the road has a steep down grade, causing difficulty to vehicles going over same and which could be remedied by filling in the turnpike at this point, forming an easier grade and less abrupt change of grade at the east end of the bridge.

The report of H. R. Reed for the years 1911, 1912 and 1913, giving the expenditures for material and labor of so limited amounts causes serious doubt as to whether the company was taking proper and sufficient care of the turnpike, as the amounts during those years paid the gate-keeper, superintendent, secretary or treasurer, far exceed the amounts expended on the maintenance of the turnpike.

The receipts for tolls, averaging about \$655.00 per annum, indicate that the affairs of the company require most careful and economical management.

The complainant's allegation regarding tolls was that they are unreasonable for the service afforded, in that they are not in accordance with those authorized by the Act of 1849; and that the tolls for an automobile, being a four-wheeled vehicle without horses, should not exceed those for a four-wheeled vehicle drawn by one horse. The tolls charged horse drawn vehicles are within or less than those authorized under the Act of 1868, which is supplementary to the Act of 1853; and the increasing use of automobiles requires for their safe and comfortable passage, that all highways be maintained in a better condition than formerly, and than has been considered necessary for horse drawn vehicles, with a resulting increase in the cost of highway repairs and maintenance.

The annual receipts of the respondent cannot be considered excessive in the amount necessary to provide funds for the main-

tenance of four and one-half miles of turnpike road and some return on the investment in the capital stock of the company, and it is the opinion of the Commission that the rates of toll are reasonable and lawful.

The complainant at the hearing withdrew its charge of discrimination.

The Commission is further of the opinion that the respondent has not performed its full duty toward the proper maintenance of the road, and that the respondent should

1st. Repair or renew the hand or guard rail on the approaches to the bridge at the "woolen mill."

2d. Raise the surface of the road at the east end of said bridge to form an easier grade approaching the bridge.

3d. Maintain and keep the ditches along the sides of the road open and free from obstruction at all reasonable times.

4th. On or before July 1, 1915, remove the breakers now across the road, substituting therefor cross drains under the road surface, and in accordance with the act of the legislature relating thereto approved by the governor June 15, 1911.

5th. Continue a systematic and regular annual repair to the surface of the road by the addition of broken stone to such an extent as its receipts provide funds for the necessary expenditure.

6th. Report to the Commission the time of completion of the work herein directed under first, second, third and fourth.

#### ORDER.

This case being at issue, upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof.

Now, to wit: October 20, 1914, *it is ordered*, that the West Kishacoquillas Turnpike Road Company shall:

1st. Repair or renew the hand or guard rail on the approaches to the bridge at the "woolen mill."

2d. Raise the surface of the road at the east end of said bridge to form an easier grade approaching the bridge.

3d. Maintain and keep the ditches along the sides of the road open and free from obstruction at all reasonable times.

4th. On or before July 1, 1915, remove the breakers now across the road, substituting therefor cross drains under the road surface, and in accordance with the act of the legislature relating thereto approved by the governor June 15, 1911.

5th. Continue a systematic and regular annual repair to the surface of the road by the addition of broken stone to such an extent as its receipts provide funds for the necessary expenditure.

6th. Report to the Commission the time of completion of the work herein directed under first, second, third and fourth.

By the Commission,  
FRANK M. WALLACE, *Acting Chairman*.

JAMES THOMPSON AND M. A. HANNA CO. v. ERIE COUNTY ELECTRIC COMPANY.

*Electric service—Classification of patrons—Reasonableness of rates—Discrimination—Comparison of rates—Evidence—Act of July 26, 1913, Art. III, Sec. 1, (b) P. L. 1387.*

The complainants who entered into a compact with the respondent for service prior to the passage of the Public Service Company Law, which contract has not expired, alleged that the respondent had adopted an unreasonable and unjust classification in the schedules and tariffs filed by said company, and that by reason thereof the complainant was compelled to pay a higher rate than other consumers under practically the same circumstances and conditions. Complainants also alleged that the rates charged by the respondent were unjust and unreasonable, in that it could secure its power at a lower rate under another schedule filed by respondent.

The evidence showed that the amount of current used by the complainants varied greatly in different months and years; that during part of the year no current at all was used; that the current used was identical with that furnished to other patrons; that the schedule applicable to the complainants applies to no other patrons of the respondent; that under said schedule the rate is slightly higher than under other schedules of rates for power of the respondent; that charges for current at the ore dock in Buffalo amount to a flat rate of \$400 per month; and that complainants in estimating the rates they would be charged under another schedule had omitted entirely any calculation upon an important item therein.

*The parties agreed:* that, though their contract antedated the Public Service Company Law, the Commission had jurisdiction to examine the reasonableness of the rates in question.

*Held:* (1) That a public service company, in adopting classifications, is not limited to the methods of production, distribution and operating

costs, but is authorized by the Public Service Company Law [Art. III, Sec. 1, (b)] to take into account "the nature of, the use, the quantity, the time when used, the purpose for which used, etc," and that the classification extends to the customer, his uses, requirements, etc.

(2) That under the evidence the respondent was justified in classifying its customers, and basing said classification on the varying conditions attending the service.

(3) The evidence that a flat rate of \$400 per month was charged at the ore dock in Buffalo was irrelevant because no evidence was produced to show the amount of current used or the amount of work done at Buffalo.

(4) Evidence to show that the rates under another schedule of the same respondent would be less, is valueless, where an important item entering into calculations under said schedule has been omitted.

#### COMPLAINT DOCKET NO. 141.

#### Report and Order of the Commission.

Submitted Feb. 5, 1914.

Decided August 18, 1914.

*William P. Rossiter*, for complainants.

*John S. Rilling*, for respondent.

#### COMMISSIONERS TONE AND WRIGHT:

James Thompson and M. A. Hanna and Company, co-partners, doing business under the name, style and title of "James Thompson Dock Account," filed its complaint February 5, 1914, against the Erie County Electric Company, stating that on February 24, 1911, it entered into a contract with the Erie County Electric Company for a supply of electric current for operating an Hulett Ore Unloading machine at Erie, for the period of five years from January 1, 1911, to December 31, 1915, in accordance with certain rates named therein; that on January 1, 1914, the Erie County Electric Company issued its "Classification, Schedule of Rates and General Information Explanatory," in which, Schedule 9, applies to the service furnished the complainant.

The complaint alleges [1] that the tariff prescribed under said schedule 9 was made and published for the purpose of applying to the complainants alone; [2] that said Schedule 9 does not apply to any other person, firm or corporation served by the respondent; [3] that the complainant is charged more for current under Schedule 9 than it would be charged if the current were furnished

under Schedule 8 of said "Classification, Schedule of Rates, Etc.;" [4] that the respondent refuses to furnish the current to complainant under said Schedule 8, [5] that the complainant has presented formal request to the respondent to cancel the contract of February 24, 1911, and return same to the complainant, and that the respondent has refused to cancel and return the said contract; [6] that for one year the cost to the complainant for current under Schedule 9 would amount to approximately \$7,774.00, while under Schedule 8 the cost would be approximately \$2,782.37; [7] that the respondent charges and demands from the complainant, for the services rendered, greater compensation than it charges and demands from other persons and corporations for a like and contemporaneous service under like and similar circumstances and conditions; [8] that said charges are unjust, unreasonable and unlawful.

On February 25, 1914, the respondent filed its answer, stating that it had refused to cancel and return the said contract to the complainant unless the payment of the minimum charges as therein provided for, first be made by the complainant; and denying that Schedule 9 of its "Classification, Schedules of Rates and General Information Explanatory" was made and published for the purpose of applying to the complainants alone, and denying that said schedule does not apply to any other person, firm or corporation; and alleging [1] that at this time the complainant is the only user of current under Schedule 9, which schedule was made to apply to an undesirable class of power business, which respondent does not care to take under Schedule 8, due to the character of the load and special conditions required to fulfill the same; that it has refused to permit the complainant to take its current under Schedule 8; [2] that the cost to the complainant for current for the one year named in the complaint, under Schedule 9 was \$7,774.00, and that under Schedule 8 its cost would have been approximately \$6,584.88; [3] that the respondent first entered into a contract to supply electric current to the complainant on November 5, 1907, for a term of four years from January 1, 1908, to December 31, 1911, in which contract the minimum yearly payment was \$7,000.00; [4] that at the request of the complainant the said contract was cancelled by the execu-

tion of the present contract on February 24, 1911, in which the minimum charge per year was fixed at \$3,000.00; [5] that owing to fluctuations in voltage due to wide variations in the current used in operating the Hulett Unloader, a separate transmission line and a reserved amount of generating apparatus at the power station are required for the service; and denying [6] that it charges and demands from the complainant for the services rendered, greater compensation than it charges and demands from other persons and corporations for a like and contemporaneous service under like and similar circumstances and conditions; and denying [7] that the said charges are unjust, unreasonable and unlawful.

Both parties to the complaint, on April 21, 1914, in accordance with notice from the Commission, presented legal arguments, cited authorities and later filed briefs "upon the power of the Commission to inquire into the reasonableness of the rate, in view of the fact that the contract stipulating the rate was entered into prior to the enactment of The Public Service Company Law on July 26, 1913."

Counsel for both parties though differing as to the source of the Commission's authority over and the method of enforcement of its order relative to any change in the rates in this contract by reason of its antedating the enactment of The Public Service Company Law, admitted and agreed that the Commission had power to inquire into the reasonableness of the rates named in the contract between the two parties, and to regulate such rates if it should find the same unreasonable, notwithstanding the fact that the contract was entered into prior to July 26, 1913.

Thereupon a hearing was held May 22, 1914, upon the complaint as to the unreasonableness of the rates in the said contract.

From the testimony presented, the following facts are found:

The Erie County Electric Company, on November 5, 1907, entered into a contract for a term of four years, with James Thompson, of Erie, Pa., and M. A. Hanna & Company, of Cleveland, Ohio, operating the Philadelphia and Erie Ore Dock, agreeing to install an engine and generator of 500 kilowatt capacity, to be maintained and operated for supplying electric service to the ore dock, erect the necessary transmission lines; and furnish and

deliver at said ore dock during the season of navigation, defined as from April 1st, to December 25th of each year, 3 phase, 60 cycle, alternating current at 2,300 volts, for operating a Hulett Ore Unloading Machine, used in unloading and transferring iron ore from vessels at, to cars on, said ore dock. The contract provided that the customer was to pay the electric company for electric current delivered at the ore dock at the rate of 4 cents per kilowatt hour and that the payments in any one year were to be not less than \$7,000.00. In the fall of 1910, James Thompson requested a modification of the terms of the contract, and a new contract between the same parties was entered into February 24, 1911, for a term of five years, beginning January 1, 1911, and ending December 31, 1915. This contract provided that the customer was to pay the electric company for electric current delivered at the ore dock at the rate of 4 cents for the first 100,000 kilowatts used, and 3 cents for the next 40,000 kilowatts used, and 2 cents for all current used in excess of 140,000 kilowatt hours in any one season of navigation; that the payments in any one year were to be not less than \$3,000.00, and that the contract of November 5, 1907, "is hereby cancelled." During the years 1911, 1912 and 1913 the current was furnished under the terms of the contract of February 24, 1911. The amount of current furnished each year and the payments made were as follows:

<i>Year.</i>	<i>Amount of Current.</i>	<i>Payments.</i>
1909,.....	226,400 K. W. Hours, .....	\$9,056.00
*1910,.....	95,340 K. W. Hours, .....	*3,813.60
1911,.....	98,150 K. W. Hours, .....	3,926.00
1912,.....	181,000 K. W. Hours, .....	6,020.00
1913,.....	268,700 K. W. Hours, .....	7,774.00
*Plus \$3,186.40 to make up the minimum of \$7,000.00.		

On January 1, 1914, the Erie County Electric Company published its schedule of tariffs and rates, among which are two, Schedules 8 and 9, which are the occasion and form the basis of this complaint. Copies of said Schedules 8 and 9 are given in Appendix sheets I and II herewith. The Erie County Electric Company generates practically its entire output of electric current at one power station, and the current furnished to the ore dock now comes generally from the same generators and switchboard

as current furnished to its other power customers. The Erie Lighting Company, a competitor of the Erie County Electric Company since 1912, has offered to furnish the electric service required at the ore dock for the Hulett Unloader, under its Schedule "D" which is the same as Schedule 8 of the Erie County Electric Company. Copy of said Schedule "D" is given in Appendix sheet III herewith. Ore unloaders at other Lake Erie ports are operated by electric current produced by the operators of the unloaders, except at Buffalo, where James Thompson operates another ore dock, having thereon a Hulett Unloader, two 5-ton Brown unloaders, a centrifugal pump, and a system of electric lights, and secures the electric current for operating all of said apparatus from the Furnace Company at the flat rate of \$400.00 per month for 12 months per year.

The allegations of the complainant that Schedule 9 applies to no other customer of the respondent, that complainant is charged more under Schedule 9 than it would be under Schedule 8, and that the respondent refuses to furnish the service under Schedule 8, are admitted by the respondent; and the respondent also admits its refusal to cancel the said contract, with the offer, however, to do so, provided the minimum payments due thereunder be made to it by the complainant. This matter of cancellation of the contract is one that this Commission has no authority over.

The other allegations of the complaint are—that Schedule 9 was made and published for the purpose of applying to the complainant alone, and that for one year the cost to complainant for current under Schedule 9 was \$7,774.00, while under Schedule 8 it would have been \$2,782.37 and as therefore the respondent charges complainant more than it charges other customers for like and contemporaneous service under like and similar conditions and circumstances, such charges are unjust, unreasonable and unlawful.

As bearing upon the reasonableness of the rates, the testimony given, that the Erie Lighting Company offered to furnish the same service under its Schedule "D," and that the charges for current at the ore dock at Buffalo amount to a flat rate of \$400.00 per month, furnish no intelligent or proper comparison to the rates complained of, for the reason that no testimony was given



nor data secured as to what the maximum demand or its resulting "Demand" charges would be under and as provided in said Schedule "D," nor what was the amount of current used or amount of work performed at Buffalo as compared to Erie.

The complainant established and emphasized the fact that the electric current it received, is a part of the same current, produced at the same time, in the same place, by the same generator, and at the same cost per kilowatt for production, as is the current furnished to and "produced for the vast number of other power customers" of the respondent.

Is it lawful then for the respondent to charge the complainant a rate different (be it more or less), from what it charges other power customers? Is Schedule 9 reasonable and lawful in itself, and in its application to the complainant, and are the rates therein just, reasonable and lawful?

The Public Service Company Law enacted July 26, 1913, provides in Article III, Section 1: "It shall be lawful for every public service company—"

"(a). To demand, collect and receive fair, just and reasonable prices, rates, fares, tolls, charges, or other compensation, for each and every service rendered, or to be rendered by it, to any person or corporation, or to any other public service company with whom it interchanges facilities or services."

"(b). To employ in the conduct and management of its business, suitable and reasonable classifications of its service, patrons and rates; and such classifications may, in any proper case, take into account the nature of, the use, and quantity used, the time when used, the purpose for which used, the kind, bulk, value, and facility of handling commodities, and any other reasonable consideration."

and in Article III, Section 8—"It shall be unlawful for any public service company—"

"(a). To charge, demand, collect or receive, directly or indirectly, by any special rate, rebate, drawback, abatement, or other device whatsoever, from any person or corporation, for any service rendered, or to be rendered, a greater or less compensation or sum than it shall demand, charge, collect, or receive from any other person or corporation for a like and contemporaneous service under substantially similar circumstances and conditions.

From the above, it is evident that the classification authorized is not limited to the methods of production, distribution and operating costs of the producer, but is authorized to be applied to "the nature of, the use, the quantity used, the time when used, the purpose for which used, etc."; and that the "classification" extends to the customer, his uses, requirements, et cetera. Under such enactment it is proper and lawful for the respondent to classify its power customers.

Examination of the testimony and exhibits, shows that among the respondent's power customers, the complainant has the lowest monthly current consumption for 2, 3 or 4 months of the year, and then for 5, 6 or 7 months is the fifth highest consumer of current for power, and, that the complainant's total annual current consumption has a wide and irregular variation, being for the years 1909, 1910, 1911, 1912, 1913, respectively 226,400; 95,340; 98,150; 181,000 and 268,700 K. W. hours.

It has long been recognized in the manufacture of electricity that irregularity in the current demands of a customer results in the least desirable class of business owing to the necessity of making provision for furnishing sufficient service at the times of greatest requirements for same, and then having a greater or less portion of the power station equipment idle at other times, when the customer has no need of the full amount that provision has been made for. Another difficult service to maintain is where the requirements are subject to sudden and recurring wide fluctuations. In such cases unusual precautions and provisions are required at the generating station to prevent the variable demands of one customer, unless served from an individual generator, affecting adversely the regularity of the voltage and current furnished to all the other customers. The evidence as to such fluctuations in the current required for the unloader of the complainant is limited to the statement of T. W. Thomas, electrician. (Page 156).

"Last Tuesday, the 19th, I got down to the dock early, and I observed the A. C. Ammeter for five hours steady. The lowest reading we observed was  $32\frac{1}{2}$  amperes at 2,300 volts, the highest, I just got one peak of 50 amperes, two peaks of 49 amperes, and the balance ran along 42 amperes."

And, respondent's exhibit 7, which chart is without data as to the exact interval of time covered, and from which no definite comparisons can be made. It does indicate, however, a considerable and recurring fluctuation in the current requirements at the ore dock, and as in addition, the complainant uses but a small amount of current for two to four months per year, and then a very much larger quantity (200 to 400 times as much) during the "season of navigation"; and also with a large variation in the quantity of current required from year to year, it is the opinion of the commissioners that a classification covering such service, and the service rendered to the complainant, is proper and lawful.

In considering the reasonableness of the rate, the complainant maintains that the rate charged, results in it being required to pay a larger amount per year for its current than if it were to receive current under Schedule 8; or were to receive current from the Erie Lighting Company under its Schedule "D," and fixes the amount of excess charge at about \$4,991.00 for the year. This is in error owing to the complainant entirely ignoring the amount accruing under the item of "Maximum Demand" charges provided for in Schedule 8; and in connection with other evidence tends to indicate a question whether the complainant clearly understands the terms and conditions of Schedule 8 and their application. The respondent states that under Schedule 8 the annual charge would be approximately \$6,584.88, and in Exhibit "E" of its answer gives an estimated "Maximum Demand," but neither party ever had any data therefor. An examination of complainant's Exhibit "C"—being a list of a large number of respondent's power customers receiving current under Schedule 8—shows that a customer's total monthly consumption divided into his total monthly payment for any one month gives "an average monthly rate" materially different from his average monthly rate (thus figured) for other months; the variation in such "average monthly rate" being material and ranging in cases from 2.2 to 2.71 cents per K. W. hour; and, inasmuch as the energy charge is uniform each month, is due entirely to variation in the "Maximum Demand" and the charges therefor. Further examination of complainant's Exhibit "C" indicates that some of the respondent's power customers receiving service under Schedule 8 are

paying a higher average rate per K. W. hour, and others a lower average rate than is complainant; and that the average rate is different for each customer served under Schedule 8, depending upon the consumption and a monthly variable,—the customer's maximum demand. From this it is evident that definite data of the maximum demand must be secured before any proper comparison of charges under Schedule 8 can be made. Assuming the respondent's *estimated* "Maximum Demand" to be approximately correct, the average resulting rate per K. W. hour for current furnished the complainant under Schedule 9 is somewhat greater than it would be under Schedule 8.

As the average rate per K. W. hour to power customers served under Schedule 8 varies for each customer monthly, and varies also as between different customers; and as the average rate for the complainant under Schedule 9 is not considered unreasonably higher than it would be under Schedule 8; and as the respondent is considered entitled to a separate classification for the service rendered to the complainant, it is the opinion of the Commission after consideration of all the circumstances, that the rates named in the respondent's Schedule 9 of its "Classification, Schedule of Rates, etc.," are not unjust, unreasonable nor unlawful, and it accordingly directs that the complaint be dismissed.

## APPENDIX I.

ERIE COUNTY ELECTRIC COMPANY      Schedule 8.  
*Power Rate.*

Wholesale Raw Current Service.  
For not less than  $7\frac{1}{2}$  Horse Power.

Schedule of rates for power by alternating 3 phase, 60 cycle, 2,300 volts or over. Raw current, when customer provides transformer, or takes current at 2,300 volts, or over.

**MAXIMUM DEMAND.**—\$1.00 per Kilo Watt per month.  
Energy Charge:—

For all over 250,000 K. W. Hrs. per mo. at .0085c. per K. W. Hr.  
For 160,000 K. W. Hrs. per mo. at .009 c. per K. W. Hr.  
For 80,000 K. W. Hrs. per mo. at .0096c. per K. W. Hr.

For 40,000 K. W. Hrs. per mo. at .0099c. per K. W. Hr.  
 For 20,000 K. W. Hrs. per mo. at .0105c. per K. W. Hr.  
 For 10,000 K. W. Hrs. per mo. at .01125c. per K. W. Hr.  
 For 5,000 K. W. Hrs. per mo. at .012 c. per K. W. Hr.  
 For 3,000 K. W. Hrs. per mo. at .015 c. per K. W. Hr.  
 For 2,000 K. W. Hrs. per mo. at .018 c. per K. W. Hr.  
 For 1,000 K. W. Hrs. per mo. at .0225c. per K. W. Hr.  
 For less than 1,000 K. W. Hrs. per mo. at .03 c. per K. W. Hr.  
 (All kilowatt hours consumed between each range to be charged at next lowest rate.)

**Maximum Demand.**—On 15 kilowatt installation or over, the demand shall be measured by a Maximum Demand Meter indicating for each separate service taken as a unit the monthly maximum demand; but, the aggregate quantity of current used of such separate services (where there are separate services) shall be charged at the lowest rate for energy charge resulting from addition of all such separate services.

**Minimum Monthly Charge.**—\$15.00.

**Discount.**—Less 5 per cent. for payment on or before 10th day of each month.

**Motors.**—All alternating Current Motors larger than 40 H. P. in capacity shall be Synchronous Motors.

**Transformers.**—The company will provide transformers for Wholesale Raw Current Customers for a rental of 10 per cent. per year of cost of transformers, to be paid in monthly installments. The company reserves the right to specify the size of transformers to be used on rental basis.

## APPENDIX II.

### ERIE COUNTY ELECTRIC COMPANY

### Schedule 9.

#### *Power Rate.*

#### *Season of Navigation Service.*

Schedule of Rate for power by alternating, 3 phase, 60 cycle, 2,300 Volt, or over, Raw Current, when customer provides transformer or takes current direct without transformer, and uses the current at irregular intervals during the season of navigation, and occasionally before and after navigation, if required.

For first . . 100,000 K. W. Hrs. per season @ 4c. per K. W. Hr.

For next . . 40,000 K. W. Hrs. per season @ 3c. per K. W. Hr.

For all over 140,000 K. W. Hrs. per season @ 2c. per K. W. Hr.

Minimum Season Charge,—\$4,000.00.

Discount.—None.

## APPENDIX III.

## ERIE LIGHTING COMPANY

## Schedule D.

*High Tension or Wholesale Power Rate.*

Available for all consumers using the company's 2,200 volt, 3 phase, service for power purposes. Consumers having a connected load of at least fifty (50) horsepower may supply themselves with light from this power service to an extent not exceeding 20 per cent. of the total connected load.

*RATE.*

Demand Charge \$1.00 per K. W., Maximum demand per month.  
Energy charge as follows:

For 250,000 K. W. Hrs. per mo. or more	\$.0085	per K. W. Hr.
For 160,000 K. W. Hrs. per mo.	.009	per K. W. Hr.
For 80,000 K. W. Hrs. per mo.	.0096	per K. W. Hr.
For 40,000 K. W. Hrs. per mo.	.0099	per K. W. Hr.
For 20,000 K. W. Hrs. per mo.	.0105	per K. W. Hr.
For 10,000 K. W. Hrs. per mo.	.01125	per K. W. Hr.
For 5,000 K. W. Hrs. per mo.	.012	per K. W. Hr.
For 3,000 K. W. Hrs. per mo.	.015	per K. W. Hr.
For 2,000 K. W. Hrs. per mo.	.018	per K. W. Hr.
For 1,000 K. W. Hrs. per mo.	.0225	per K. W. Hr.
For less than 1,000 K. W. Hrs. per mo.	.03	per K. W. Hr.
Prompt payment discount, 5 per cent.		

*Maximum Demand.*

By maximum demand is meant the largest amount of power used for a period of five minutes during the month. This is determined or measured by a maximum demand meter or meters. On installations of 15 KW or less, the maximum demand will be taken as 75 per cent. of the transformer capacity.

Minimum monthly charge under this schedule is \$15.00.

*Transformers.*

The consumer may provide his own transformers or the company will provide and maintain transformers under this schedule at a rental charge of 10 per cent. per year of the cost of the transformer, payable in monthly installments. The company reserves the right to specify the size of transformers to be used.

## ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof.

*Now, to wit: August 18, 1914, it is ordered,* That the complaint in this proceeding be, and it is hereby dismissed.

By the Commission,

FRANK M. WALLACE, *Acting Chairman.*

## COUNTY COURT OPINIONS.

GOODYEAR RAINCOAT COMPANY v. BROUDY.

*Right to use of corporate name—Similarity—Confusion in the mind of the public—Remedy.*

The Goodyear Raincoat Company was incorporated in Pennsylvania in 1908, and has since been engaged in the sale of waterproof garments at retail. In March, 1913, the manager of the company severed his connection with it and a month later entered into the same business for himself under the names, "The Goodyear Rainproof Company," and "The Goodyear Waterproof Company." His advertising cards and street signs are so similar to those of the complainant as to deceive an ordinary person.

*Held:* The complainant, having been duly incorporated in this State, has the right to the use of its name as a part of its corporate entity, and an injunction will issue to restrain the use, in this State, of the same name or a name so similar as to produce confusion in the public mind.

Bill for injunction. No. 1720, July Term, 1913. C. P. Allegheny County.

C. H. Sachs, for plaintiff.

L. S. Levin, for defendant.

SWEARINGEN, J.

In this proceeding the complainant, a corporation, sought to have the defendant, an individual, restrained from using the name under which he has been conducting his business, upon the grounds, that the defendant has no right to use a name similar to its name, that he has been seeking by false representations to gain an unfair advantage over it, and that his conduct has produced and will produce confusion in the minds of the public and in the transaction of its business, to its irreparable loss.

From the evidence we find the following:

## FINDINGS OF FACT.

1. The Goodyear Raincoat Company, the complainant, is a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania. Its charter was duly granted by the lawful authorities of said Commonwealth, on March 26,



1908, and the same is of record in the recorder's office of Allegheny County, Pennsylvania, in Charter Book Vol. 43, page 504. It was organized for the purpose of conducting a retail merchandise business in the buying and selling of waterproof garments in Pittsburgh, Pennsylvania. Its place of business is in said city, where it has two stores, one of which is located at No. 325 Fifth avenue, and the other at No. 432 Wood street, and at said locations it is and has been conducting its business under its corporate name, Goodyear Raincoat Company.

2. For some time prior to said incorporation, some of the persons who are stockholders in said corporation were engaged as a partnership in the same business and under the same name, and the complainant and its predecessors had advertised said name and established a valuable business in buying and selling raincoats and waterproof garments.

3. Moses W. Broudy, the defendant, was in the employ of the complainant as manager of one of its said stores in Pittsburgh for a period of about three years, prior to March 1, 1913, at which time their relations was severed. About April 1, 1913, he engaged in buying and selling raincoats and waterproof garments, and for that purpose he opened a store at 604 Liberty avenue, in said City of Pittsburgh, where he has since been conducting substantially the same business as that of the complainant, sometimes under the name, "Goodyear Rainproof Company," and sometimes under the name, "Goodyear Waterproof Company." Prior to April 1, 1913, he had never engaged in such business on his own account in the State of Pennsylvania.

According to the evidence, there is no rubber in the raincoats sold by either the complainant or the defendant.

4. The defendant placed a large electrically illuminated sign over the front entrance of his said store, which reads, "Goodyear Raincoats." In the word "Goodyear," the letters "G" and "R" are much larger than the other letters, and this is the style which the complainant had been using for a long time prior thereto and of which the defendant had knowledge. The only portion of the complainant's corporate name, which is omitted from this sign of the defendant, is the word "Company."

5. The defendant printed and issued cards to the public an-

nouncing his business and the location thereof. There are very slight differences between these cards and those used by the complainant. An inspection of them discloses that they are so similar as to deceive the ordinary person. No one, unless he looks with extreme care, would discover that the cards of the defendant were not the cards of the complainant. There is no doubt that the former were copied from the latter. This was evidently done in such a manner as to lead the public to believe the cards were issued by the same party. From his position as manager of one of the stores of the complainant, the defendant necessarily knew the form of advertising cards used by the complainant.

6. The conduct of the defendant, as disclosed by the evidence, has produced confusion in the minds of people who have dealings with the complainant. At least one person, who desired to go to the complainant's store, inadvertently found his way into the defendant's store, and made a purchase. He was misled by the sign over the door. While making a purchase, a clerk in the employ of the defendant falsely represented to him that his niece was working in the factory, when she was in fact employed by the complainant as cashier.

7. In at least one instance a bill for services rendered to the complainant was addressed to the defendant's store, and was there opened by his bookkeeper. The letter was marked "Opened by mistake," and returned, and it finally reached the complainant. The person who misssent this bill was confused by the names of the complainant and the defendant in the telephone directory.

8. Prior to the filing of this bill, the complainant served notice upon the defendant to discontinue doing business under the names, "Goodyear Rainproof Company" and "Goodyear Waterproof Company," which notice he has disregarded.

From the foregoing, we reach the following:

#### CONCLUSIONS OF LAW.

First. This is not a case of a trade mark attached to an article of commerce or of manufacture. It is a case involving the right to use a name. The complainant, having been duly incorporated under the name of "Goodyear Raincoat Company," it has the right to the use of that name as a part of its corporate entity, and the defendant has no right to use the same name, or a name so

similar as to produce confusion in the public mind. The adoption by the defendant of the name, "Goodyear Rainproof Company," and of the name, "Goodyear Waterproof Company," is an unlawful interference with the rights of the complainant.

Amer. Clay Mfg. Co. v. Amer. Clay Mfg. Co., 198 Pa., 189.

Second. The effect of the conduct of the defendant, as disclosed in the findings of fact, is to induce the public to believe that his business is connected with that of the complainant, and the natural and probable result will be irreparable injury to the complainant.

Third. The intent of the defendant in adopting the names, which he has, in advertising his business, as he has, and in the conduct of his business, as shown, was to thereby secure to himself an unfair and a fraudulent share of the complainant's business.

Fourth. By reason of the said wrongful acts of the defendant, the injury which the complainant has suffered and will suffer is irreparable, and for the same it has no adequate remedy at law.

Fifth. An injunction should issue, restraining the defendant from doing business under the names, "Goodyear Rainproof Company," and "Goodyear Waterproof Company," within the State of Pennsylvania, restraining him, his agents and employees from representing that his store at No. 604 Liberty avenue is identified with the complainant, and requiring him to remove the signs, "Goodyear Raincoats," from his store at 604 Liberty avenue and from any other store which he may occupy in Pennsylvania.

Sixth. The costs of this proceeding should be paid by the defendant.

Unless exceptions are filed within the time prescribed by the Rules in Equity, let a decree be drawn in accordance with the Findings of Fact and Conclusions of Law and submitted, as provided in said rules.

## MCDOWELL v. NORTH SIDE BRIDGE CO.

*Coupons—Action to recover on—Presumption of payment.*

Plaintiff's decedent was the owner of coupons of the defendant company which represented interest on bonds issued in 1884. Some of the coupons are twenty-eight years overdue. During eighteen years prior to the death of the decedent he made no demand for payment, and no demand was made by his executrix until about ten years after his death.

*Held:* The presumption of payment of these coupons can only be overcome by clear and convincing proof. The evidence in this case does not furnish such proof.

On motion for a new trial. C. P. Allegheny County. No. 338, July Term, 1913. Docket B.

*James M. Clark*, for plaintiff.

*Reed, Smith, Shaw & Beal*, and *W. M. Robinson*, for defendant.

BROWN, J.

Mrs. McDowell, widow of N. M. McDowell, deceased, and executrix of his last will, brought this action against the North Side Bridge Company to recover \$7,500 with interest from January 1, 1885—represented by coupons (\$7,500). These coupons are the coupons referred to in McDowell's Appeal, decided by the Supreme Court in 1889, 123 Pa. St. R. 381.

On July 1, 1884, the bridge company issued bonds to the amount of \$250,000, payable in thirty years, with interest coupons payable semi-annually at the rate of six per cent. per annum. The first (\$7,500) interest coupons, attached to the bonds, fell due January 1, 1885.

These bonds, with stock issued by the company, formed the consideration passing from the company to N. M. McDowell for the bridge to be constructed by him.

McDowell's right to the bonds and stock was assigned by him to A. A. Hutchinson, who had agreed to finance the cost of the bridge work; and thereafter, on completion of the bridge work, he and McDowell were to divide the profits.

The bridge was completed January 1, 1885. Preceding its completion, Hutchinson, after advancing a portion of the money, de-

faulted for several months. Growing out of this failure of Hutchinson to advance the money promptly as required on the bridge work, McDowell, in the latter part of 1886, filed a bill in equity against Hutchinson and the bridge company to secure an equitable settlement of the dispute between himself and Hutchinson, 123 Pa. 381. In the trial of this action McDowell, on April 29, 1887, testified:

"Q. About the payment of these coupons, state whether or not it was a necessity that an arrangement should be made for protecting these coupons, in order to effect the sale of these bonds?

A. We had to guarantee the payment of the coupons; everybody that bought these bonds knew the bridge company could not pay them. We had to assure them they would be paid. The bridge company were compelled to advance the bonds in order that they might be negotiated, advance them before they were really due; and that was one of the reasons why the contractors were under an obligation to protect the first maturing coupons, being advanced for the accommodation of the contractors; Mr. Hutchinson not having provided money to enable the bridge to be completed within the amount of these bonds and stocks.

Q. State what right of action you have, if any, against the bridge company for these coupons.

A. I don't consider I have any. When this matter is settled and I am able to do it, I will turn them over to them.

Q. For the reason already stated?

A. Yes, sir."

McDowell died June 18, 1903—more than eighteen years after these coupons fell due. His will, dated May 13, 1890, appointing his wife as executrix, was not probated until April 22, 1913—almost ten years after his death.

From January 1, 1885, to February 23, 1913,—a period of more than twenty-eight years after the coupons fell due—no demand was made for payment; and then, for the first time, Mrs. McDowell as executrix demanded payment, and thereafter brought this action.

There is not a shadow of testimony that in all the eighteen and a half years preceding his death McDowell claimed that the bridge company owed the amount of these coupons to him.

The strong presumption of payment of the coupons—after the lapse of more than twenty-eight years—cannot be swept aside except, as the Supreme Court has said, by “satisfactory and convincing” testimony. As no testimony of such strength and measure appears in this case, the presumption of payment stands as a bar to plaintiff’s right to recovery. In addition to this presumption, we have McDowell’s testimony, above quoted, that he had no right of action against the bridge company. Having no right of action himself, his widow and executrix has none.

The verdict for defendant was properly directed.

New trial refused.

NATIONAL FREIGHT BUREAU *v.* DEPPEN BREWING CO.

*Practice—Proof of corporate existence—Collateral attack.*

The defendant, at the time of making a contract with the plaintiff, recognized it as a corporation and dealt with it as such. In a suit brought upon the contract the defendant pleaded non-assumpsit and went to trial without denying the corporate existence of the plaintiff. Defendant asked the court to charge that, since the plaintiff had not shown its incorporation, verdict should be for the defendant, and, upon refusal of the point, asked for a new trial and for judgment n. o. v.

*Held:* (1) The defendant is estopped from denying the corporate existence of the plaintiff.

(2) Having pleaded to the merits and having failed to deny the plaintiff’s corporate existence in a plea in abatement, the defendant cannot attack it collaterally; and refusal to charge as requested is not ground for granting a new trial. Pleading to the merits admits the plaintiff’s capacity to sue.

*Dissolution—Purchase of entire stock by one person.*

The purchase by one person of all the shares of stock of a corporation does not effect a dissolution of the corporation.

Assumpsit. Rule for new trial and for judgment n. o. v. C. P. Berks County. No. 58, Sept. Term, 1911.

*E. H. Deysher*, for defendant and rules.

*W. K. Stevens*, for plaintiff.

Opinion by WAGNER, J., August 10, 1914.

Plaintiff brought suit against defendant for the recovery of

\$222.50, with interest, \$46.72, making a total of \$269.22. The claim is founded upon a written contract executed in duplicate by the parties on January 26, 1913, each party retaining one of the duplicates. The jury found a verdict in favor of the plaintiff.

The agreement upon its face states that the National Freight Bureau was incorporated in 1908, and that it has a capital of \$50,000, fully paid. Indeed it was not seriously contended at the time of the trial that when the contract was made, it, the National Freight Bureau, was not a corporation. It was only in the submission of defendant's first point that the question was really raised, wherein the court was asked to instruct the jury that: "The plaintiff having failed to show its incorporation by competent evidence, cannot recover in this action, and the verdict must be for the defendant." The defendant claimed that the only competent evidence of plaintiff's incorporation was its certificate. The evidence shows that at the time of the negotiations between the parties, defendant recognized plaintiff as a corporation and dealt with it as such. The change of method of payment endorsed on the back of the duplicates is signed by the National Freight Bureau with E. N. Getzler as treasurer. If defendant made a contract with plaintiff as a corporation, and received the fruits thereof, it is estopped from denying its corporate existence. In 10 Cyc. 245, we have this principle: "Whenever a private person enters into a contract with a body purporting to be a corporation, in which contract the body is described by the corporate name which it has assumed, such private person solemnly admits the existence of the corporation for the purposes of the suit brought to enforce the obligation, and in such an action will not be permitted to plead nul tiel corporation or otherwise to deny the corporate existence of plaintiff." Neither was the corporate existence of the plaintiff put in issue by the pleadings. "In every suit or judicial proceeding, in this Commonwealth, to which a corporation is a party, the existence of such incorporation shall be taken to be admitted, unless it is put in issue by the pleadings." Act of June 24, A. D. 1885, P. L. 149. It was therefore not necessary for plaintiff to prove its corporate existence by its certificate of incorporation.

The question really contended for by the defendant during the

trial was that the plaintiff was dissolved after it had entered into this contract, and consequently was not in a position to recover. This is made the basis of defendant's second and third points. The plea in this case was one of non-assumpsit, that is, one to the merits of the case. This collateral issue therefore could not be raised at the time of the trial. In *Lehigh Bridge Company v. Lehigh Coal and Navigation Company*, 4 Rawle's Rep. 8, on page 24, we have: "It was held, in *First Parish, in Sutton v. Cole*, 3 Pickering 245, that the existence of a corporation plaintiff is to be brought in question only by plea in abatement; and the same view seems to have been taken by a majority of the judges in *Monumoi v. Rogers*, 1 Mass. R. 159. Certainly the matter must be put in issue by such a plea, or at least one which denies the whole declaration; for pleading ever specially to the merits, as was done here, clearly admits the plaintiff's capacity to sue." Also in *Bridge Co. v. Traction Co.*, 196 Pa. St. 25, page 29: "It is settled beyond all question in this state that the existence of a corporation or its right to exercise its corporate franchises cannot be inquired into or attacked collaterally; *Irvine v. Lumberman's Bank*, 2 W. & S. 190; *Cochran v. Arnold*, 58 Pa. 399." Even if the question of plaintiff's corporate existence could be raised as attempted by defendant, the evidence was not sufficient to establish the fact of dissolution at the time of the suit. Edwin N. Getzler, treasurer of the corporation, in the beginning of his testimony, stated that plaintiff was no longer in existence as a corporation. That it was dissolved. When, later on, he was asked (N. of T., p. 11), what he meant by the statement that the company was dissolved, he stated that on October 7th, when he got the balance of the shares of stock, and then had the whole of the stock in his own hands, that he then started a new set of books, and made an application to an attorney for dissolution; but that he presumed that as he owned all the stock, nothing else was necessary, and that that was the reason why he used the word dissolution. The fact that he acquired the entire stock did not dissolve the company. In *Bridge Co. v. Traction Co.*, supra, it is stated, on page 28: "It is well settled that all the shares in a corporation may be held by a single person, and yet the corporation continue to exist." Also in *Pt. Bridge Co. v. P. & W. E. Ry. Co.*, 230 Pa.



St. 289, page 293, Mr. Justice Moschzisker, in referring to *Bridge Co. v. Traction Co.*, just cited, says: "We ruled this defense to be insufficient and said that the purchase of the stock of the bridge company did not dissolve that corporation or vest the ownership of the bridge structure in the city." See also *Goetz's Est.*, 236 Pa. St. 630, 635.

The only other question then is whether the verdict is against the weight of the evidence. The witnesses called as bearing upon the terms of the contract were Edwin N. Getzler, treasurer of plaintiff, and James F. Mahoney, treasurer of the defendant, and James Taylor, a stockholder and director of the Deppen Brewing Company, all interested parties. Getzler testified that the contract was evidenced by the written agreement, which was executed in duplicate. That there was an agreement for payment at variance with that shown on the face of the contract, is admitted by both parties. The plaintiff claims that the agreement as to change of method of payment was as expressed by the written part contained upon the back of each of these duplicate agreements. This endorsement clearly supports the contention of the plaintiff, that is, that when the first audit was returned, if the overcharges shown exceeded the fee charge of \$100 that then only should the subscriber pay, and if it is shown that the overcharges were less than \$100, that then the subscriber should pay only an amount equal to the overcharges refunded. The defendant claimed that the contract as to payment was that in no instance was it liable for payment of any sum except as it was first collected from the railroad companies. We have then the oath of the treasurer of the plaintiff company and the written agreement to support plaintiff's contention, as against the oaths of two representatives of the defendant in support of its claim as to what the agreement was as to payment. Under these circumstances we cannot say that the jury in believing the written endorsement on these duplicate agreements, supported by the oath of the treasurer of the plaintiff, to be the contract, as against the oaths of two of the officers of the defendant company, decided against the weight of the evidence.

Defendant has also filed a rule for judgment n. o. v. This is based upon its contention that there was a dissolution of the plaintiff corporation. This we have already considered.

Rules for new trial and for judgment n. o. v. are discharged.

## BARND v. FIRST NATIONAL BANK

*Resolution of Board of Directors—Parol evidence to explain the terms of.*

Parol evidence is admissible to explain the meaning of words in a resolution passed by a board of directors. The recorded acts are not the only evidence admissible in a case.

Motion for new trial. C. P. Schuylkill County. No. 225, March Term, 1914.

*H. O. Haag and J. W. Moyer, for rule.*

*R. S. Bashore, contra.*

KOCH, J., July 27, 1914.

The reasons assigned in support of the motion are: (a) That we erred in our charge to the jury; (b) That we erred in refusing the defendant's points; and (c) That we erred "in admitting oral evidence of the minutes and transactions before the board of directors."

The particulars in which we are said to have erred in our charge to the jury have not been pointed out, and a careful reading of the charge has disclosed to us no observable error.

The evidence obliged us to submit the case to the jury, and we could not, therefore, affirm the defendant's second point, because that would have taken the case from the jury; nor could we affirm the first point, because such affirmance would have disregarded important testimony in the case; and qualifications of the point were not necessary, as we had already charged the jury fully on all the matters stated in the point.

The minutes of the board of directors, of a meeting held on the 27th day of November, 1909, contain the following: "Resolved, that we set aside of the profits two hundred dollars for expense account, two hundred dollars for interest, one hundred eighty for back pay, two hundred thirty-four dollars for salary of the directors for the year, one hundred dollars for the salary of the president, provided the profits warrant it."

We allowed oral evidence to be introduced to explain the words "Two hundred dollars for expense account." It will presently

appear that we erred not in admitting such evidence. In this case the plaintiff sued the defendant for eighty-three dollars and thirty-three cents due to him for salary as former president of the defendant bank. The claim was not disputed, but the defendant undertook to defeat the claim by a set-off of one hundred and ninety-four dollars and sixty-three cents and the set-off was rooted in the said "expense account." No expense account was produced, and the bank's own position in the case required more information for the jury than the mere words of the resolution. In the light of the verdict of the jury, the alleged objectionable evidence shows that in 1909 Barnd, the plaintiff in this case, was sued by one Jeff Geist for one hundred and one dollars, which Geist claimed under an agreement with Barnd for obtaining subscriptions for one hundred and one shares of the said bank's capital stock during the formation period of the corporation, and that Geist won his case and thereby put Barnd to a total expense of one hundred and ninety-four dollars and sixty-three cents. Thereupon the board of directors of the bank concluded to reimburse Barnd, because his agreement with Geist was made in the interest of the bank and not in the interest of Barnd himself, and they passed the foregoing resolution the day following the rendition of the verdict against Barnd.

Some weeks later, and after Barnd had paid the judgment and costs in the Geist case, his account in the bank and his own individual deposit book were credited with the amount thereof, to wit, one hundred and ninety-four dollars and sixty-three cents. Barnd's deposit book was balanced about a dozen times after that, and now, in this suit, the bank attempts to convert the \$194.63 into a loan to Barnd, and to use it as a set-off here, or, failing that attempt, then prove that Barnd fraudulently obtained credit for said \$194.63, by representing to the board of directors that Geist's suit was brought against him as president of the bank and not against him individually. Under such circumstances, the mysterious "Expense account" certainly needed explanation. Had the evidence been restricted to the admission of the resolution alone, the real truth in the case would have been suppressed.

The recorded acts of a board of directors are not the only admissible evidence in a case. Unrecorded acts are just as admissible when necessary to a clear understanding of the case.

Fisher v. South Williamsport, 1 Superior Ct., 386; Traction Co. v. Canal Co., Ibid., 409, 415; In re Annexation of Morrellville, 7 Superior Ct., 532, 546; School Directors v. McBride, 22 Pa., 215; Furniture Co., v. School District, 158 Pa., 35; McGowan v. Steamboat Co., 181 Pa., 55.

And now, July 27, 1914, the motion in arrest of judgment and for a new trial is overruled and it is ordered that judgment be entered in favor of the plaintiff on the verdict of the jury, upon the payment of the jury fee.

CRANE RAILROAD CO. v. CENTRAL RAILROAD CO. OF NEW JERSEY.

*Industrial railroads—Common carriers—Rates—Discrimination—Interstate Commerce Act—Filing of tariffs and schedules—Constitution of Penna., Art. XVII, Secs. 1 and 3.*

The plaintiff's statement set forth that it was incorporated as a railroad under the laws of Pennsylvania in 1905, that it operates a line in Pennsylvania connecting with the line of the defendant, that it hauled cars to and from points of destination and origin without as well as within this State, that in 1906 it filed its tariffs and schedules with the Interstate Commerce Commission charging therein a rate of \$2.00 per car, that defendant in its published tariffs and schedules recognized the said rate as the reasonable and lawful rate on freight passing over plaintiff's line, that between Jan. 1, 1907, and July 22, 1909, it performed certain transportation services for the defendant for which defendant has refused to pay, and that the said rate charged was just and reasonable.

The affidavit of defense set forth that prior to plaintiff's incorporation it was a mere plant facility of the Crane Iron Works, that it was constructed for the purposes of the said industry, that the plaintiff had entered into a special contract providing for a much lower rate, that plaintiff is not a common carrier, and that plaintiff is not subject to the jurisdiction of the Interstate Commerce Commission.

*Held:* (1) Upon a rule for judgment for want of a sufficient affidavit of defense all matters averred in the declaration and not denied must be taken as admitted.

(2) The plaintiff, having been incorporated as a railroad under the laws of Pennsylvania, is, under Art. XVII, Sec. 1 of the Constitution, a common carrier.

(3) Under the decisions of the Supreme Court of the United States the plaintiff is a common carrier within the meaning of the Act to Regulate Commerce.

(4) The plaintiff, in so far as it formed a link in the through transportation of goods from one state to another, was engaged in interstate commerce and was subject to the jurisdiction of the Interstate Commerce Commission.

(5) The rates of the plaintiff filed with the said Commission were the only proper and lawful rates which it might charge, and any contract it may have had with the defendant providing for a lower rate was illegal and void.

(6) As to intra-state shipments, any special contract between the parties was illegal and void under Art. XVII, Sec. 3 of the Constitution of Pennsylvania.

(7) The affidavit of defense was insufficient.

Rule for judgment for want of sufficient affidavit of defense.  
C. P. Lehigh County. No. 57, September Term, 1913.

*George W. Aubrey, Cyrus G. Derr and W. A. Glasgow, Jr., for plaintiff.*

*Frank Jacobs, for defendant.*

GROMAN, P. J., September 8, 1914.

This action in assumpsit was brought to recover the sum of \$2,176.44, with interest from September 1, 1909. The following facts are established by the pleadings:

The plaintiff, the Crane Railroad Company, is a corporation incorporated on July 28, 1905, under the laws of the State of Pennsylvania, and operates a railroad partly in Lehigh County, Pennsylvania. The defendant, the Central Railroad Company of New Jersey, is a corporation incorporated under the laws of the State of New Jersey, and operates a railroad connecting with plaintiffs road in or near the Borough of Catasauqua, Pennsylvania. Between January 1, 1907, and July 22, 1909, the plaintiff performed certain transportation services for the defendant, for which the defendant has refused to pay. The plaintiff, during the latter part of 1906, in accordance with the requirements of the Interstate Commerce Act, filed with the Interstate Commerce Commission, at Washington, D. C., and posted and kept open for public inspection, schedules showing all its rates and charges for transportation. The plaintiff specified that a charge of two dollars per car would be made for all cars transported over its own lines

from and to lines with which its line connected, including the line of defendant, this charge to include hauling the loaded car and returning it empty, or placing the empty car and returning it loaded. The charge of two dollars for the services rendered was a reasonable charge.

The defendant had knowledge of the filing of schedules by the plaintiff, and also filed, printed and kept open for public inspection, schedules of rates and charges for transportation, one of which schedules became effective February 2, 1907, and another April 18, 1907, in which rates established by the plaintiff company were recognized as applying to shipments made to certain industries located on plaintiff's line, coal and coke only excepted. That the defendant collected the whole charge aforesaid, but refused to pay the plaintiff the schedule charges here sued for, however, paying plaintiff such charge of two dollars since May 31, 1911.

The defendant from time to time delivered to the plaintiff for transportation over its line certain cars from points and industries along its line, and the plaintiff from time to time delivered to the defendant for transportation over its line certain cars, the cars so delivered and transported by the parties to this suit, as to the point of origin and destination, being for points within as well as without the State of Pennsylvania. The above facts are found to be admitted by the pleadings.

The defendant, in its affidavit of defense, sets forth that prior to plaintiff's incorporation as a railroad company the tracks now owned and operated by it were owned and operated by the Crane Iron Works, an industrial corporation chartered under the laws of the State of Pennsylvania, having blast furnaces along line of its railroad; that said railroad was constructed and operated for the purpose of transporting the iron company's freight to and from its works to and for points of shipment or destination, and that the compensation was fixed at the rate of six cents per ton for freight so transported; that after its incorporation the plaintiff company demanded greater compensation for such services, which the defendant refused to pay. The affidavit further sets forth that the plaintiff was not a common carrier by rail and was not subject to the supervision of the Interstate Commerce Commission, but

that the rates and charges for transportation were matters of contract between the parties to this suit; that the plaintiff was only the agent for the company known as the Crane Iron Works.

The plaintiff, thereupon, entered a rule on the defendant to show cause why judgment should not be entered for want of a sufficient affidavit of defense.

It is a well established principle in pleading that matters averred in the declaration and not denied, must, upon a rule for judgment in default of a sufficient affidavit of defense, be taken as admitted. *Ashman v. Weigley*, 148 Pa. St., page 63. Applying this rule we find certain admissions relevant to the adjudication of this case. The facts so admitted are hereinbefore set forth. The pleadings raise one question which it seems to the court goes to the very marrow of the whole matter: Is the plaintiff railroad corporation a common carrier or is it not? In so far as the State of Pennsylvania is concerned the plaintiff company, having been organized for the purpose of operating a railroad company under the laws of the state, after the adoption of the Constitution in 1874, is subject to all constitutional conditions, restrictions or limitations.

Section I of Article 17, of the Constitution of Pennsylvania, provides:

"All railroads and canals shall be public highways, and all railroad and canal companies shall be common carriers."

This provision of the Constitution is as binding upon the railroad company as though it were a part of the charter itself. In fact, the organic law of the state has declared railroad corporations to be common carriers. This is a proposition so self-evident that argument is superfluous. The plaintiff, under the constitutional provisions of the State, is, therefore, declared to be a common carrier. Is the plaintiff also a common carrier, with rights and obligations as such, in so far as interstate commerce is concerned, or is it merely a plant facility? Does it come under the provisions of the Act of Congress entitled, "An Act to regulate commerce"? The Interstate Commerce Act referred to was amended January 29, 1906, and provides, *inter alia*, as follows:

"That the provisions of this act shall apply . . . to any common carrier or carriers engaged in the transportation of passengers or

property wholly by railroad. . . . from one state or territory of the United States. . . . to any other state or territory of the United States."

The points in question were passed upon and decided in the cases of the United States and Interstate Commerce Commission, Appellants, v. Louisiana and Pacific Railway Company, et al., in Nos. 829, 830, etc., Oct. Term, 1913, Appeals from the United States Commerce Court, wherein the Commerce Court vacated and set aside the Commission's order made in said cases, reading as follows: [234 U. S. 1.]

"That the tracks and equipment with respect to the industry of the several proprietary companies are plant facilities, and that the service performed therewith for the respective proprietary lumber companies in moving logs to their respective mills and performed therewith in moving the products of the mills to the trunk lines is not a service of transportation by a common carrier railroad, but is a plant service by a plant facility; and that any allowance or divisions out of the rate on account thereof are unlawful and result in undue and unreasonable preferences are unjust discriminations, as found in the said reports:

"3. It is ordered, That the principal defendants (trunk lines, naming them), be, and they are hereby notified and required to cease and desist, and for a period of two years hereafter, or until otherwise ordered, to abstain from making any such allowances to any of the above named parties to the record in respect of any such above described service."

The question before the Supreme Court was the correctness of this decree.

"A perusal of the findings and orders of the Commission make it apparent that the grounds of decision upon which it proceeded were two, first, that these roads were mere plant facilities, second, that they were not common carriers as to proprietary traffic. The Commission held that before incorporation they were plant facilities and that after incorporation they remained such. What the Commission means by plant facilities may be gathered from a consideration of some of its decisions. In *General Electric Co. v. N. Y. C. & H. R. R. R.*, 141 C. C. 237, a network of interior switching tracks constructed to meet the necessities of the business, were held



to be mere plant facilities. The same principle was applied to the internal trackage of large industrial plants in *Solvay Process Company v. Delaware, Lackawanna & Western R. R. Co.*, 141 C. C. 246. These systems of internal trackage were not common carriers, and, however, extensive, were intended to and did furnish service for the plants which owned and operated them. But a common carrier performing service as such, regulated and operated under competent authority, as observed by Commissioner Prouty in *Kaul Lumber Co. v. Central of Georgia Rwy. Co.*, et al., 20 I. C. C. 450, 456, is no longer a mere appendage of a mill "but a public institution." It thus becomes apparent that the real question in these cases is the true character of the roads here involved. Are they plant facilities merely or common carriers with rights and obligations as such?

It is insisted that these roads are not carriers because the most of their traffic is in their own logs and lumber and that only a small part of the traffic carried is the property of others. But this conclusion loses sight of the principle that the extent to which a railroad is in fact used, does not determine the fact whether it is or is not a common carrier. It is the right of the public to use the road's facilities and to demand service of it rather than the extent of its business which is the real criterion determinative of its character. This principle has been frequently recognized in the decision of the courts. We need not cite the many state cases in which it has been so held, in view of the fact that the same principle was laid down in the late case of *Union Line Co. v. Chicago & N. W. Ry. Co.*, 233 U. S. 211. In that case the Supreme Court of Wisconsin sustained the extension of a spur track to reach the quarries and lime kilns of a single company as a public use authorizing the exercise of the right of eminent domain, and this court affirmed the judgment. Dealing with the contention that the Wisconsin statute was invalid because it authorized action appropriating property upon the exigency of a private business, this court said (p. 221):

"A spur may, at the outset, lead only to a single industry or establishment; it may be constructed to furnish an outlet for the products of a particular plant; its cost may be defrayed by those in special need of its service at the time. But none the less, by

virtue of the conditions under which it is provided, the spur may constitute at all times a part of the transportation facilities of the carrier which are operated under the obligations of public service and are subject to the regulation of public authority. As was said by this court in *Hairston v. Danville & Western Rwy. Co.*, supra (208 U. S. 598): "The uses for which the track was desired are not less public because the motive which dictated its location over this particular land was to reach a private industry, or because the proprietors of that industry contributed in any way to the cost." There is a clear distinction between spurs which are owned and operated by a common carrier as a part of its system and under its public obligation and merely private sidings. See *De Camp v. Hibernia R. R. Co.*, 47 N. J. Law, 43; *Chicago, etc., R. R. Co. v. Porter*, 43 Minn. 527; *Ulmer v. Lime Rock R. R. Co.*, 98 Me. 579; *Railway Company v. Petty*, 57 Ark. 359; *Dietrich v. Murdock*, 42 Mo. 279; *Bedford Quarries R. R. Co. v. Chicago, etc., R. R. Co.*, 175 Ind. 303."

The Commission has recognized this principle as applicable to tap lines, for in *The Central Yellow Pine Association v. The Vicksburg, Shreveport and Pacific R. R. Co.*, 101 C. C. 193, 199, it said:

"While these logging roads are almost or quite without exception mill propositions at the outset, built exclusively for the purpose of transporting logs to the mill, they soon reach a point where they engage in other business to a greater or less extent. As the length of the road increases, as the lumber is taken off and other operations obtain a foothold along the line, various commodities besides lumber are transported, and this business gradually develops until in several cases what was at first a logging road pure and simple has become a common carrier of miscellaneous freight and passengers. Almost all these lines, even where they are run as private enterprises, do more or less outside transportation, and it would be difficult to draw any line of demarkation between the logging road as such and the logging road which has become a general carrier of freight.

This representation is contended by the attorney general of Louisiana, who appears here in behalf of the Louisiana Railroad

Company, intervener, is aptly descriptive of the growth and development of railroads in that state.

Furthermore, these roads are common carriers when tried by the test of organization for that purpose under competent legislation of the state. They are so treated by the public authorities of the State, who insist in this case that they are such and submit in oral discussion and printed briefs cogent arguments to justify that conclusion. They are engaged in carrying for hire the goods of those who see fit to employ them. They are authorized to exercise the right of eminent domain by the State of their incorporation. They were treated and dealt with as common carriers by connecting systems of other carriers, a circumstance to be noticed in determining their true character. *United States v. Union Stock Yards and Transit Co.*, 226 U. S. 286. They are engaged in transportation as that term is defined in the Commerce Act and described in decisions of this court. *Coe v. Errol*, 116 U. S. 517; *Covington Stock Yards Co. v. Keith*, 139 U. S. 128; *Southern Pa. Term Co. v. Interstate Com. Com.*, 219 U. S. 498; *United States v. Union Stock Yards and Transit Co.*, supra.

Applying the principles which we have stated as determinative of the character of these roads and without repeating the facts concerning them, they would seem to fill all the requirements of common carriers so employed, unless the grounds upon which they were determined not to be such by the Commission are adequate to that end. The Commission itself as to all shippers other than those controlled by the so-called proprietary companies, treated them as common carriers, for it has ordered the trunk lines to re-establish through routes and joint rates as to such traffic. But says the Government, and it insists that this fact alone might well control the decision, the roads are owned by the persons who also own the timber and mills which they principally serve.

This fact is not shown to be inconsistent with the laws of the state in which they are organized and operated. On the contrary the public authorities of that state are here insisting that these companies are common carriers. Congress has not made it illegal for roads thus owned to operate in interstate commerce."

From the foregoing citation we find that the plaintiff, by con-

stitutional provision of the State of Pennsylvania, and by the decision of the Supreme Court of the United States, is a common carrier, and being recognized as such had certain rights and obligations which were binding upon it as a common carrier as well as any other common carrier doing business with the plaintiff corporation. The act of Congress entitled, "An Act to regulate commerce," amended January 29, 1906, reads as follows:

"That the provisions of this Act shall apply . . . to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad . . . from one state or territory of the United States . . . to any other state or territory of the United States."

The plaintiff avers in the declaration, and it is not denied in the affidavit of defense, that "the points of origin and destination respectively of said cars so transported by the plaintiff" were "as in some instances within and as to the remaining instances without the State of Pennsylvania." So that we have the admitted fact that cars were transported from one state or territory of the United States to another state or territory of the United States over the line of defendant railroad company, the plaintiff railroad company being a link in such transportation.

The United States Supreme Court held that where a railroad, though wholly in one state, forms a link in a line of railroad transportation between the states, this brings the link within the provisions of the Interstate Commerce Act. The court, in *Norfolk and Western Railroad Company v. the Commonwealth of Pennsylvania*, 136 U. S., 114, held:

"Where the business of a through line of railroads consists, in part, of carrying passengers and freight into Pennsylvania from other states, and out of that state into other states, and a railroad company which is a corporation of Virginia is a link in that line, such company is engaged in interstate commerce in Pennsylvania."

The court, in this opinion, further said:

"It certainly requires no citation of authorities to demonstrate that such business—that is, the business of this through line of railroads—is interstate commerce. That being true, it logically follows that any one of the roads forming a part of, or consisting a link in, that through line, is engaged in interstate commerce,

since the business of each of these roads serves to increase the volume of business done by that through line."

The court further said:

"The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state, and some acting through two or more states, does in no respect affect the character of the transportation. To the extent in which each agency acts in their transportation, it is subject to the regulation of Congress."

The plaintiff railroad company is then, by constitutional provision of the State of Pennsylvania, as well as by the decision of the Supreme Court of the United States, a common carrier; its railroad forms part of a through line over defendant's road to parts being in the State of Pennsylvania, and under the authorities before cited it was subject to the provisions of the Interstate Commerce Act, and was required to meet the provisions of the said act relative to the filing of schedules of transportation rates, which was done by plaintiff railroad company. It is also a fact that defendant company concurrently filed schedules of transportation rates as required by the Interstate Commerce Commission, in which these rates were recognized, and the rates collected from the shippers to and on the line of plaintiff railroad.

The act to regulate commerce provides, *inter alia*, as follows:

"Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any services in connection therewith, between the points named in such tariffs, than the rates, fares and charges which are specified in the tariff filed and in effect at the time."

In other words, the rate of \$2.00 per car was the proper and legal rate and was the only rate which the plaintiff was allowed to charge or the defendant company to receive for through transportation covered by the schedules as filed. That it was a reasonable rate is admitted by the pleadings.

The Interstate Commerce Act further provides in Section 6 thereof:

"That any common carrier subject to the provisions of this act, shall file with the Commission created by this act, and print

and keep open to public inspection, schedules showing all rates, fares and charges for transportation between different points on its own route and points on the route of any other carrier by railroad.... If no joint rate over the through route has been established the several carriers, in such through route shall file, print and keep open to public inspection, as aforesaid, the separately established rates, fares and charges applied to this through transportation."

"The provisions of this section shall apply to all traffic, transportation and facilities defined in this act."

The same section further provides:

"Every common carrier subject to this act shall also file with the said Commission copies of all contracts, agreements or arrangements with other common carriers in relation to any traffic affected by the provisions of this act to which it may be a party."

The same section further provides:

"That no carrier shall engage or participate in transportation without filing schedules of rates."

The same section also provides as follows:

"Nor shall any carrier charge or demand or collect or receive a greater or less compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time."

The defendant contends that it had an agreement with the plaintiff that the tariff rate should be six cents per ton, but nowhere does it appear that such tariffs and schedules of charges or agreements were filed with the Interstate Commerce Commission as required by the act. The court is, therefore, of the view that failure to do so on the part of the defendant would not be a proper defense to this claim, nor would it preclude a recovery by the plaintiff of the amount sued for where the plaintiff has complied with all the requirements of the act. The rights of the parties as to the matter in controversy must be determined by the schedules of the rates actually filed as required by the Interstate Commerce Act.

In the case of *United States v. Standard Oil Company*, 155

Federal Report, 305, which was revised by the Supreme Court, but not on this point, LANDIS, Judge, thus stated the law:

"If a carrier enters the field for traffic destined to points beyond its line, and a shipper turns his property so destined over to it, such traffic is as clearly subject to the requirements of the Interstate Commerce Law as would be the case if the carrier owned and operated the line through to destination.

In the absence of a formal agreement establishing a joint through rate effective over a through route made up of the connecting lines of more than one carrier, the lawful rate in force over such through route is the sum of the local rates lawfully established by the several connecting carriers over their respective roads."

In the case of *A. J. Poor Grain Co. v. C. B. & Q. Ry. Co.*, et al., 12 I. C. C., 418, it was decided:

"The published rate governing transportation between two given points, so long as it remains uncanceled, is as fixed and unalterable either by the shipper or by the carrier as if that particular rate had been established by a special act of congress. When regularly published, it is no longer the rate imposed by the carrier, but the rate imposed by the law."

"Regardless of the rate quoted or inserted in a bill of lading, the published rate must be paid by the shipper and actually collected by the carrier. The failure on the part of the shipper to pay or of the carrier to collect the full freight charges, based upon the lawfully published rate for the particular movement between two given points, constitutes a breach of the law and will subject either one or the other, and sometimes both, to its penalties. Not even a court may interfere with a published rate or authorize a departure from it when it has voluntarily been established by the carrier."

In the State of Pennsylvania where a shipper inquired from an officer of the railroad company for rates for certain shipments, and the officer, by mistake, quoted a lower rate than that specified in the schedules filed with the Interstate Commerce Commission, and where it appeared that the shipper acted upon the faith of the rates quoted, for two years, and paid the mistaken rate quoted, the railroad afterwards discovering the mistake demanded and

sued for the difference between the low rate quoted by the officer of the company by mistake and the schedule rate as filed before the Interstate Commerce Commission, the difference being two thousand dollars; Justice Stewart, in the case of C. R. R. of N. J. v. Mauser, 241 Pa., 603, speaking for the court, said:

"Both parties are alike charged with full knowledge of the prescribed rates; and if either comes short in this it is his own fault through negligence, or what is worse, and neither may excuse himself by showing reliance upon representations as to prescribed rates other than those appearing in the printed and published schedule. No agreement for a rate other than that prescribed for the particular service can have any binding force. No matter how induced, the law will refuse to recognize in it any of the characteristics of a contract. In the estimation of the law such agreement is not a voidable contract which when once executed the law will not disturb what has been done thereunder, as where agreement is *contra bonos mores*; but it is an absolute nullity, because, being prohibited by statute, it is impossible for parties to contract with reference to the particular subject. Strictly speaking, there can be no such thing as a void contract; there may be an agreement to do something violative of positive law, but such agreement can never become a contract. We define a contract to be an agreement upon sufficient consideration to do or not to do a particular thing; but it is here implied that the particular thing is to be a legal and competent matter. It follows necessarily that when these defendants accepted the services of the plaintiff as carrier, the only contract under which the service was rendered was the implied one that they would pay for the services at the rate prescribed by law, seeing that that was the only rate by which the carrier was allowed to render the service."

As to such of the cars transported by the plaintiff for the defendant, as did not originate and were not destined to points beyond the state line, Section 3 of Article XVII, of the Constitution of Pennsylvania, provides as follows:

"All individuals, associations and corporations shall have equal rights to have persons and property transported over railroads and canals, and no undue or unreasonable discrimination shall be made in charges for, or in facilities for, transportation of



freight or passengers within the state or coming from or going to any other state. Persons and property transported over any railroad, shall be delivered at any station at charges not exceeding the charges for transportation of persons and property of the same class in the same direction to any more distant station; but excursion and commutation tickets may be issued at special rates."

The language of the constitutional provision is plain that the charge to shippers must be uniform whether the destination be within or without the State.

Now, September 8, 1914, for reasons hereinbefore set forth rule for judgment for want of a sufficient affidavit of defense made absolute; judgment to be entered for the sum of \$2,176.44 with interest at six per cent. from September 1, 1909, added thereto, or a total sum of \$2,829.37.

## PANARELLO v. PATTERSON, MORAN &amp; LUCK CO., ET AL.

*Service of process—Foreign corporation—Attachment—"Doing business."*

Service of a writ of attachment was made upon the secretary of a foreign corporation at his private office in this State. The company transacted much of its business here, its official papers were executed here, its accounts and seal were kept here, its name was on the building directory and the telephone was in its name.

*Held:* The mere presence of the secretary in this State will not authorize the service of a writ issued against the company, but the circumstances here show that the company was "doing business" in Pennsylvania, and the service was good.

Rule to show cause why service upon garnishee should not be set aside. C. P. Allegheny County. No. 1110, April Term, 1913.

*Jackson & Lang*, for plaintiff.

*Dalzell, Fisher & Hawkins*, for garnishee.

FORD, J.

This is a rule to show cause why the service upon the garnishee should not be set aside.

J. T. Blair, upon whom the service was made, is the secretary and treasurer of the Buckhannon and Northern Railroad Company, the garnishee. The garnishee is a corporation organized under the laws of the State of West Virginia and has its principal office in the City of Fairmount, in that state. The company has projected and proceeded to the construction of a line of railroad in the State of West Virginia. No portion of its capital stock is invested in this State. The corporation is not registered, nor has it a duly authorized agent in this State upon whom service of a writ issued out of this court can be had. If, therefore, it is shown that the corporation is not doing business or engaged in business in this State and has no office or place of business in the State, the service must be set aside.

No testimony in support of the rule was taken, but from the petition for the rule and the answer thereto, the undisputed facts are substantially as follows: J. T. Blair resides in the City of Pittsburgh, and is engaged in business affairs other than those

of the garnishee, and in connection with such business affairs maintains an office at No. 541 Oliver Building, in the City of Pittsburgh. Certain of the corporate business is also transacted in the same office. Clerks employed by the company perform their duties in the office. Mr. Blair, as the secretary and treasurer, here conducts some of the company's correspondence. The accounts and the seal of the company are kept and the official papers are executed in this office. A telephone in the name of the company is installed. A part of the executive business is transacted in this office and the banking business is done in the City of Pittsburgh.

The mere fact that the secretary and treasurer, Mr. Blair, resides in this State will not authorize the service of a writ issued against the company. In this case, however, there is more. The office occupied by Mr. Blair is used for the transaction of much of the business of the company. The name of the company is on the building directory. The installation of a telephone, the maintaining of a clerk and typewriter in the office of Mr. Blair, indicate that as a place in which business of the company may be transacted.

We are of the opinion that the garnishee was "doing business" in Pennsylvania, and the service as made upon the secretary and treasurer was authorized by law: *Jensen v. Railway Co.*, 201 Pa. 603; *Stephenson v. Dodson*, 36 Pa. Superior Ct. 345. Rule discharged.

## COMMONWEALTH v. JOHN B. STETSON CO.

*Tax on capital stock—Exemption—Manufacturing corporations—Evidence.*

(1) A manufacturing corporation whose business requires the expenditure of large sums of money for materials at uncertain times, and temporarily invests the money so needed in securities readily convertible to cash, is exempt from tax on the amount of capital stock so invested.

(2) Where the affidavit of the treasurer of a corporation is admitted in support of a claim for exemption from taxation because of the employment of capital in the manufacturing business, the facts therein contained, if uncontradicted, must be accepted as correct.

Appeal from settlement for tax on capital stock. C. P. Dauphin County. No. 546 Commonwealth Docket, 1911.

*Wm. M. Hargest*, Second Deputy Attorney General, for the Commonwealth.

*Olmsted & Stamm*, for the defendant.

McCARRELL, J., October 19, 1914.

This is an appeal by defendant from a settlement of tax on capital stock made by the accounting officers of the Commonwealth. Trial by jury has been duly waived. The appeal complains that a claim for exemption as a manufacturing company was not allowed. The defendant is a manufacturing corporation with assets of nearly \$15,000,000, employing about 5,000 persons, and doing an annual business of from \$4,000,000 to \$9,000,000. It claimed exemption under the proviso of our Act of 1893 of \$2,420,956.82 from taxation upon the ground that the same was working capital and within the meaning of the law actually and exclusively employed in manufacturing. This amount is largely invested in high class securities listed on stock exchanges and is so invested because of the readiness with which the securities can be converted into cash. The securities yield a higher rate of interest than could be obtained by depositing the money in bank. The affidavit of the treasurer of the defendant has by agreement been received in evidence. It sets out particularly the line of business in which defendant is engaged and alleges the necessity of carrying large sums of money in order to

enable it to purchase the necessary material required in its business. It uses a large number of animal skins which must be bought in foreign lands and the supply of which is uncertain and inadequate. He alleges that it is quite important to be able whenever an opportunity presents itself to purchase material of this kind to have on hand the necessary funds with which to make the purchases. He says that if the opportunity offered the company would gladly invest more than \$2,000,000 in their purchase at once. He states also that the business of the corporation is growing and that additional improvements in the way of buildings and equipment are necessary in the immediate future, and that the cost will be nearly \$2,000,000 for buildings alone. To provide for all these needs the securities above mentioned have been purchased and are carried. The securities are sold as they are needed from time to time. The proceeds are used exclusively in the manufacturing business and have never been otherwise used. The sole purpose, he asserts, is to provide the defendant company with the material and equipment reasonably necessary for the conduct of its business. He further specifically testifies as follows: "The amount is no more than is necessary for the present and immediately prospective needs of the company's manufacturing business, considering the extent and nature of the business and its rapid development. To try to get along with less would be improvident, wasteful and dangerous and as impossible from the point of view of good business as to try to do business without accumulating enough cash from day to day to meet the monthly pay rolls." The allegations of this affidavit are not denied by any testimony offered in behalf of the Commonwealth. The affiant, as an officer of the company, is undoubtedly familiar with the business operations and the business needs of the defendant. If his claim that this amount of money or securities was not reasonably necessary for the proper conduct of the manufacturing business, or was without foundation, testimony from persons engaged in the same or similar lines of business might have been produced to contradict it. This has not been done. The affidavit was admitted without question, doubtless because the Commonwealth believed that its statements were true and it did not desire to cross-examine the affiant. We have no knowledge as to the needs

of the business carried on by the defendant, except that which is furnished by the testimony submitted. This case is quite similar to that of *Commonwealth v. Dilworth Bros. Co.*, 242 Pa. 194, in which a similar affidavit of a defendant corporation was submitted as the only evidence in support of a claim for exemption from taxation because of the employment of capital in the manufacturing business, and it was there held by the Supreme Court that the statements so made were to be accepted as correct unless proof to the contrary was offered, which was not done in that case. It has not been done in this, and we can find no reason for disregarding the statements of the official under oath, which we have already referred to. It certainly must be conceded that a manufacturing corporation has the right to have on hand the amount of working capital necessary for the proper conduct of its business, and this amount, under our statute, is entitled to be regarded as actually and exclusively employed in manufacturing, and is under the law exempt from taxation. The testimony as to the amount provided by this defendant as its necessary working capital, has, as already stated, not been contradicted. If the officers of the defendant company had not believed that the setting aside of this sum as working capital was reasonably necessary for the proper conduct of the business, it certainly would have been divided among the stockholders. The fact that it has not been so divided tends to confirm the testimony already referred to. We therefore have reached the following conclusions:

1. The defendant is entitled to the exemption from taxation which it claimed at the time of the settlement.
2. The sum of \$2,420,956.82, upon which the tax was imposed by the settlement is in contemplation of law working capital actually and exclusively employed in manufacturing and is therefore exempt from taxation.
3. The settlement made against the defendant company is without authority of law.

We therefore direct that judgment be entered in favor of the defendant and against the Commonwealth, unless exceptions be filed within the time limited by law.

**COMMONWEALTH v. STANDARD UNDERGROUND CABLE CO.*****Tax on capital Stock—Exemption—Manufacturing corporations—Evidence.***

(1) That portion of the capital stock of a manufacturing corporation which is represented by cash in bank and by readily convertible securities held as working capital to purchase materials and meet the exigencies of the business, is exempt from taxation.

(2) Where the affidavit of the treasurer of a corporation is admitted in support of a claim for exemption from taxation because of the employment of capital in the manufacturing business, the facts therein contained, if uncontradicted, must be accepted as correct.

Appeal from settlement for tax on capital stock. C. P. Dauphin County. No. 149, Commonwealth Docket, 1910.

*Wm. M. Hargest*, Second Deputy Attorney General, for the Commonwealth.

*Olmsted & Stamm*, for the defendant.

McCARRELL, J., October 21, 1914.

The defendant has appealed from a settlement of tax upon its capital stock made April 11, 1910. The tax was imposed upon the sum of \$951,528. The defendant contends that this amount of its capital is used actually and exclusively in its manufacturing business and that the same is therefore exempt from taxation. Trial by jury has been duly waived. This sum is invested in bonds and stocks of various corporations. The defendant is a manufacturing company created under the laws of Pennsylvania for the purpose of the manufacture of iron or steel or both, or of any other metal or any article of metal or wood, or both, including therein underground submarine and aerial cable for the transmission of electricity. It has manufacturing plants at Pittsburgh, Pennsylvania; Oakland, California; and Perth Amboy, New Jersey. Its capital stock is \$3,000,000, of which there has been paid in \$2,800,000. Its income for the year ending the first Monday of November, 1909, was \$11,336,144.69. Its expenditures were \$10,554,666.51, making the net earnings for the year \$831,-849.85. It was agreed that the affidavit of Frank A. Rinehart, the treasurer, should be received in evidence as if he had appeared

and had been duly examined as a witness in the case. He gives a statement of the several items held by the company, amounting in the aggregate to \$951,528. Among these securities is the stock of the Imperial Varnish Works, of Newark, New Jersey, amounting to \$15,531.50, which represents the total issue of that company's capital stock. This New Jersey corporation manufactures varnishes and varnish cloth and paper, and was operated during the tax year exclusively by the defendant as an adjunct to its manufacturing business within the State of Pennsylvania. The stock of the Westinghouse Electric and Manufacturing Company and the bonds of the Independent Interstate Telephone and Telegraph Company were taken by the defendant company in payment for work done by it for these corporations. Mr. Rinehart further states that all these securities are readily convertible into cash and all or nearly all are listed on some stock exchange. The company's business is of such a character that at times it needs more cash than at others. When it needs cash it must be realized promptly. The company therefore has invested from time to time a portion of its excess funds in the purchase of securities upon which cash can readily be raised either by sale or hypothecation. He testifies that "these securities are as much a part of the manufacturing property and assets as would be an equal amount of cash reserved to meet the same kind of contingency as they are held to meet, namely, the contingency that arises from time to time that we need more money to buy raw materials, to pay wages, to carry accounts and to meet other expenses incident to the manufacturing business." Its report indicates that it does a considerable volume of business, and the treasurer testifies that it is impossible to foretell dangerous conditions with such accuracy that the defendant company can know at any time precisely when it will need more cash or how much it may need at any definite future time, and that it would be suicidal from a business point of view for the company to depend for money by borrowing in a market, the nature of which could not be anticipated and at a time when it might not be possible to borrow at all, when the company has the money of its own which it can hold and keep in reserve either by deposit in bank or the purchase of readily convertible securities as cash assets. The company does not deal in stocks or bonds or



any like securities. It invests its funds in securities held as cash or current assets solely for the purpose of successfully carrying on the business, and Mr. Rinehart distinctly states that "these securities held as a reserve we would at once sell and divide the proceeds among the stockholders if we were reasonably certain that we could successfully carry on our business without them." The treasurer is presumably well qualified to determine the business or financial needs of the corporation defendant. We have no other information as to what amount of money, or securities readily convertible into money, is reasonably necessary to enable the defendant properly to carry on its business. In the opinion of this official the sum of \$951,528 is reasonably necessary, and is actually required to meet the business needs of the corporation during the year. Its receipts during the year 1909 were \$11,333,-144.69. The amount held in reserve, as stated by the treasurer, is less than one-tenth of this sum, and we are not satisfied, in the light of the only evidence submitted, that it is excessive. It is suggested by the Commonwealth that this case is ruled by the case of *Commonwealth v. Custer City Chemical Co.*, 16 Dauphin County Reports 46, and *Commonwealth v. New York and Pennsylvania Company*, 16 Dauphin County Reports 51. The Custer Chemical Company had purchased 75,000 cords of timber sufficient for its business operations for six years. The New York and Pennsylvania Company had purchased 83,000 acres of timber land and timber rights, thus insuring a supply of timber for its corporate purposes for very many years. We held in these cases that these timber lands and timber rights were not exempt from taxation under the proviso to our Act of June 8, 1893, P. L. 353, not being actually and exclusively employed in carrying on manufacturing. Those cases differ entirely from the one now under consideration. Here the only testimony submitted is to the effect that the cash and securities making up the \$951,528 are held as working capital, believed to be reasonably necessary for the conduct of the business of the defendant during the tax year. This amount is not held for the future needs of the corporation, but for its business purposes from day to day during the year, and therein it differs entirely from the cases to which reference has been made.

In *Commonwealth v. Curtis Publishing Company*, 237 Pa. 333, The Supreme Court in considering the subject of exemption from taxation because of property employed in manufacturing, adopted the language of the president judge of this court, at page 337, as follows:

"It appears that the cash in bank is used in connection with the defendant's business. It represents capital stock employed in carrying on the business, and is incident and appurtenant thereto. It is impossible to conceive of carrying on a business without a bank account. Of course the amount of cash in bank is an important consideration when the question of exemption is claimed. If the amount is no more than is reasonably necessary, and the deposit is strictly incident to and employed in the business, it is entitled to the same exemption allowed other property actually employed. We do not mean to say that all cash in bank, to any amount, would be exempt, but so much as is essential to and actually used in the business. There is no suggestion by the Commonwealth that the sum of \$50,000 in the present case is in excess of the business needs of the defendant."

Whether the defendant company carries cash in bank for the purpose of meeting its business needs or holds securities readily convertible into cash or readily acceptable as security for cash advanced can make no difference in the principle. The defendant company is entitled to carry such working fund as will enable it to meet the demands of its manufacturing business. Its officers are charged with the duty of determining how much shall be carried for the purpose.

In our opinion this case is quite similar to that of *Commonwealth v. Dilworth Company*, 242 Pa. 194, in which it appears that the sum of \$100,000 was during several tax years held by Dilworth, Porter & Co., payable on demand as the defendant company might require it for its business purposes. Portions of it were drawn and used for these purposes during certain of the years, and it was there held that this sum was entirely exempt from taxation. In discussing this question, Mr. Justice ELKIN at page 198 of the case just cited, uses the following language:

"The reports show that a certain amount of cash and current assets were on hand at the time they were made, but nothing contained therein can properly be taken to mean that this capital

was not exclusively employed in the manufacturing business. The presumption is that the cash and current assets on hand were deemed necessary in conducting the business, and we have not been able to discover any evidence from which a different inference might be fairly drawn. On the other hand, it is averred in the affidavit filed by appellant, which by agreement was to be accepted as evidence in the case, that the \$100,000 in question was exclusively employed in the manufacturing business, and was deposited subject to check or call on like terms and conditions as if deposited in a bank."

Here the only evidence submitted to us is that of the treasurer of the company. This is uncontradicted. No attempt has been made to prove that the cash and securities stated by him to be held as the necessary working capital of the defendant during the year is inaccurate. Persons familiar with the business operations and needs of like companies could have been called to testify if this sum was not reasonably necessary for carrying on the manufacturing operations of the defendant. We have just considered this question in the case of *Commonwealth v. John B. Stetson Company*, 546 Commonwealth Docket, 1911, (See preceding case) in which the facts are practically identical with those in this case. The testimony in behalf of the defendant here being clear and specific, and no attempt being made by the Commonwealth to show that the money and securities claimed to be exempt are not reasonably necessary to enable the defendant to carry on its manufacturing business, we are of opinion that it has been sufficiently shown that it is necessary for this purpose. If so, it is exempt from taxation. We have therefore reached the following conclusions:

1. The defendant is entitled to the exemption from taxation which it claimed at the time of the settlement.
2. The sum of \$951,528 upon which the tax was imposed by the settlement is in contemplation of law working capital actually and exclusively employed in manufacturing and is therefore exempt from taxation.
3. The settlement made against the defendant company is without authority of law.

We therefore direct that judgment be entered in favor of the defendant and against the Commonwealth, unless exceptions be filed within the time limited by law.

**PUBLIC SERVICE COMMISSION****BOROUGH OF LEWISTOWN v. PENN CENTRAL LIGHT & POWER COMPANY.*****Rates—Discrimination between localities—Fair return on investment—Competition.***

Respondent's rates for electricity for domestic and business purposes are 12, 9, and 3 cents per k. w. h. in Lewistown, Reedsville, and Huntingdon respectively. Its rates for power are uniform. Complainant alleges that the rate of 12 cents in Lewistown is excessive and discriminatory.

Respondent's investment in Lewistown devoted exclusively to residential business is \$48,600, on which its net revenue is less than 2%, not allowing for renewal reserve. Its investment devoted to both domestic and commercial business is \$94,500 and its net revenue thereon is less than 5%. Its entire investment is \$180,000 and its total net revenue on all business is a little over 7%. These figures do not include any allowance for going value or depreciation.

The respondent's investment in Huntingdon is \$153,000, from which it derived in one year a profit of \$300, not allowing for taxes, fixed charges or renewal reserve. It is here in competition with a rival company.

*Held:*—1. The rates in Lewistown are not excessive.

2. The charging of a lower rate at Huntingdon, where active competition exists is not discrimination. (Cf. Goerlich et al v. Bethlehem City Water Co. 1 P. C. R. 213.—Ed.)

**COMPLAINT DOCKET No. 174.****Report and Order of the Commission.**

Submitted March 21, 1914.

Decided November 6, 1914.

*William N. Trinkle*, for the Commission.

*L. J. Durbin*, for the complainant.

*James Collins Jones*, for the respondent.

**COMMISSIONER WRIGHT:**

On March 21, 1914, J. Price Wertz, of Lewistown, Mifflin County, complained to the Pennsylvania Public Service Commission that the Penn Central Light & Power Company had established meter rates, and during January and February, 1914, charged and collected for electricity used for domestic and business purposes, as follows:

"12c. per k. w. hour for the Borough of Lewistown; 6c. per k. w. hour for the Borough of Reedsville, and 3c. per k. w. hour for the Borough of Huntingdon; all being under substantially similar circumstances and conditions," and that such difference gave an undue and unreasonable preference to residents of Reedsville and Huntingdon, and that said rate of 12c. per k. w. hour in the Borough of Lewistown was unfair, unjust, unreasonable, exorbitant and excessive.

Upon a hearing of the above complaint held on Tuesday, July 21, 1914, witnesses testified that the schedules and tariffs of the company in Reedsville and Lewistown were identical; that Lewistown has a population of about 9,000, Reedsville about 500, and Huntingdon about 8,000; that the tariff rates in Reedsville and Lewistown were now 12c. per k. w. hour, less 20%, or 9 6-10c. per k. w. hour for the first thirty hours, and 6c. less 20%, or 4 8-10c. for the second thirty hours service.

The evidence also shows that in Huntingdon the rate charged is 3c. per k. w. hour for domestic and commercial uses; that the power rate is uniform throughout the entire system of the respondent.

The evidence also was to the effect that "the respondent company had, at large expense, made a complete investigation of the value and an analysis of the revenue and expenses of the boroughs and towns mentioned in the complaint, and that in the Borough of Lewistown, their total investment was approximately \$180,000.00; for the Borough of Huntingdon, \$153,000.00, not including any allowance for going value or depreciation; that the revenue for Lewistown, actual, for ten months and estimated for two months, for the year ending July 1, 1913, was \$38,638.00, less operating expenses and taxes properly chargeable to the Lewistown plant of \$25,923.00, leaving a net revenue from Lewistown of \$12,715.00, or a trifle over 7% on the amount invested in that borough.

The evidence also shows that in Lewistown alone, approximately \$94,500.00 represents the capital investment employed in domestic and commercial lighting, or 53 per cent. of investment in that borough, and on this the company derived only \$4,500.00 revenue, applicable to dividends, incomes and surplus, or less than 5% of their investment; and that the company had approximately

\$48,600.00 for capital investment devoted exclusively to residential business, upon which their net revenue, if considered alone, is less than 2%, not allowing anything for renewal reserve; that the value of the Huntingdon plant is approximately \$153,000.00," and evidence shows that the company derived a profit of less than \$300.00 without allowing for taxes, fixed charges or renewal reserve; no interest being charged.

At Huntingdon, although the rate is 3c. per k. w. hour, the evidence shows that the number of customers has decreased since January, 1912, when another company began service in that borough, and the decrease would have been much greater had not the Penn Central Light & Power Company secured many new customers who had never before used electricity.

The evidence also shows that the revenue from Huntingdon has largely decreased, and the decrease would also have been greater had it not secured new customers who had not before used electricity.

From the evidence produced at the hearing it seems plain that when considering Lewistown alone, without reference to Huntingdon, the rates do not appear to be excessive nor do they appear to be in excess of what would be considered a legitimate income for the amount of capital invested in that borough. The Commission does not consider it fair to order the reduction of a rate, which by the evidence is shown to be fair and reasonable, on account of the fact that in another community the company is furnishing current at a price below the cost thereof.

The evidence also shows that if the respondent should increase their rates in the Borough of Huntingdon they would undoubtedly have a decrease in the number of customers, as well as in their revenue, as they are now unable to retain many of their customers who have changed and are now connected with another electric company.

While the evidence seems to be conclusive that the patrons of the company in Huntingdon are paying less than what could be considered a reasonably fair rate, on the other hand, if the respondent should increase their rates and lose their present revenue, their plant would be useless and be almost a total loss to the stockholders of their company. The present rates of the company in Huntingdon were made for the purpose of meeting competition,

otherwise the company would lose its customers, and the large investment in that borough would be a loss to the stockholders.

It appears, therefore, that the rates of respondent in the borough of Lewistown are just and reasonable, and it is hereby directed by the Commission that an order be entered dismissing the complaint in this case.

#### ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date thereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

*Now, to-wit November 6th, 1914, it is ordered:* That the complaint in this proceeding be, and it is hereby dismissed.

By the Commission:

FRANK M. WALLACE, *Acting Chairman.*

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#### C. C. FISCUS *v.* PHILA. & READING RAILWAY CO.

*Train service—Discrimination between localities—Failure to show public demand for additional service.*

Complainant alleges that the passenger train service of the respondent on its East Penn Branch between Allentown and Reading is unsatisfactory, and that it discriminates against Allentown; and asks that an express train running in the evening between these points be stopped at local points or that an additional local train be provided to accommodate passengers.

*Held:*—As there was no testimony at the hearing to show to what extent people would take advantage of such train service in the evening, or to what extent the demand for it was based on the needs of the community, the Commission is not warranted in requiring the respondent to stop its express, which competes with other lines for through traffic, or to incur the expense of installing an additional local train.

#### COMPLAINT DOCKET No. 245.

Report and Order of the Commission.

Submitted June 29, 1914.

Decided November 19, 1914



*E. M. Vale*, for the Commission.

*Paul Reilly*, for the complainant.

*William L. Kinter*, for respondent.

COMMISSIONER BRECHT:

The complainant in this proceeding sets forth that he is a resident of Mertztown, Berks County, Pennsylvania, engaged in the business of manufacturing rugs and carpets; that "in pursuance of the requirements of his business, he makes frequent trips to New York City"; that "although his place of business is only about one hundred miles from New York City," he is obliged, in order to reach home, to leave New York at 12:50 p. m., or else by taking the next train which leaves New York at 5:00 p. m., he is compelled to "go past his home to Reading, where the train arrives at 8:29 p. m., and then return eastward to Mertztown, on the train leaving Reading at 8:37 p. m."; that "frequently" the train from New York is a few minutes late, compelling him "to remain over night in Reading"; that "divers other persons living between Allentown and Reading are in the same situation as complainant"; and that train service between Allentown and Reading discriminates against Allentown "in the number of trains and the time when such trains are operated."

The Chamber of Commerce of Allentown joined in this complaint, alleging that the schedule of train service maintained by respondent on the East Penn Branch "discriminates against the interests" of Allentown and "in favor of those of the City of Reading"; and asking for "train service during the middle afternoon and late evening, by which residents along the line of this railroad might come to this city for business purposes, and return to their homes at a reasonable hour."

The East Penn Branch of the Reading Railroad connects Allentown and Reading, and is 35.8 miles long. There are thirteen stations maintained on the line, and five local trains operated between Reading and Allentown each way daily except Sunday. From Topton, which is about half-way between Reading and Allentown, there are two additional trains each way to Allentown and return, thus giving all stations between Topton and Allentown seven trains each way. From Allentown there is also a

half-hour trolley service to Macungie, 9.2 miles along the East Penn Branch, and from Reading, a trolley service every hour to Fleetwood, 11.3 miles more or less, paralleling the same road. There is no trolley service, or at least no convenient trolley service between Macungie and Fleetwood.

Mertztown is a small community of approximately several hundred people, on the East Penn Branch, 15.3 miles from Allentown and 20.5 miles from Reading by rail. On week days there are seven trains for Allentown stopping at this point between 5:47 a. m. and 9:21 p. m.; and seven trains west as far as Tipton, five of them being scheduled for Reading.

Trains from Reading after twelve o'clock noon making all stops reach Allentown at 1:35 p. m.; 4:17 p. m. and 9:52 p. m., and from Kutztown, by way of Tipton, at 5:37 p. m.; returning, local trains leave Allentown for Reading at 1:37 p. m. and 4:28 p. m., and for Kutztown, via Tipton, at 6:08 p. m. The train leaving at 6:08 p. m. is the last train of the day over the East Penn Branch making local stops west of Allentown. It is with the late afternoon and evening trains over the East Penn Branch into and out of Allentown that this complaint is concerned.

The respondent railway company is petitioned (1), to provide train accommodations from the City of Allentown to Mertztown and other local points on the East Penn Branch after the train from New York reaches Allentown at 7:35 p. m., either by stopping the aforesaid express train at the various local stations, or by installing a local train to follow the express train about eight or half-past eight o'clock in the evening; (2), to give the residents living along the East Penn Branch the same train facilities to get to Allentown and back that is offered to them with respect to the City of Reading.

The train which arrives at Allentown at 7:35 p. m. from New York, and which complainant is asking to have stopped at local points between Allentown and Reading is known as train No. 9. This train leaves New York at 5:00 p. m. and is operated as a through express to Harrisburg, making the run in five hours and ten minutes. As the train is competing for through express traffic with Pennsylvania Railroad trains, some of which make the time between New York and Harrisburg in four hours and one-half, it cannot be expected to retain its proper share of the traffic and

otherwise maintain its status as an express train, if required to make more frequent stops. Furthermore, this train also makes important connections at Reading with trains from Williamsport, Pottsville and Philadelphia, and outbound trains to Pottsville, Tamaqua, Philadelphia and Allentown. To stop the train at points along the East Penn Branch would necessitate re-arranging this entire schedule of train connections at Reading, and more or less seriously affect schedules and train connections in the evening upon all the important lines of the respondent company. Under the circumstances, the request of complainant for this service must be denied.

It now remains to ascertain if a local passenger train should be installed to operate over the East Penn Branch from Allentown to Reading after 7:35 p. m. The complainant testified that he makes from thirty to forty trips a year to New York when he is put to inconvenience and expense in reaching home from Allentown by reason of the fact that such accommodations are not offered to the public; that he knew of three other persons living along the East Penn Branch who make frequent trips to New York and who are similarly situated; that a petition containing four hundred and twenty-eight names of residents along the East Penn Branch was handed to respondent last January, asking for a local train west out of Allentown in the evening. The record in this case also shows a list of names of business men who are said to be desirous for such services, but who did not personally appear and testify at the hearing. The secretary of the Chamber of Commerce of Allentown also testified that the merchants of Allentown "desire this later train from Allentown west to Reading."

There was no testimony offered at the hearing, however, to show to what extent people would take advantage of such train service in the evening, or to what extent the demand for it was based upon the needs of the community. The rather meager evidence placed upon the record can not be regarded as sufficient to warrant the Commission in requiring the respondent to incur the expense of installing an additional train for service that is not more clearly and fully established by complainant.

It should be observed that residents along the East Penn Branch can reach New York City, have three hours for business, and re-

turn the same day, if they care to avail themselves of the morning service offered by respondent. There is a train leaving Mertztown at 5:57 a. m., which arrives at New York at 9:30 a. m.; and a return train which leaves New York at 12:30 p. m., making all stops at East Penn Branch points, and arrives at Mertztown at 4:59 p. m.

It is also contended by complainant that respondent offers better train accommodations over the East Penn Branch during the late afternoon and evening to Reading and return than to Allentown and return, thus discriminating in favor of Reading and against Allentown. There is nothing appearing on the record to show that Allentown has suffered any detriment in its business interests by reason of the fact that it did not have the later train service in the day.

Under the present schedule, the last train over the East Penn Branch, making local stops, leaves Allentown at 6:08 p. m. and runs as far west as Topton, and then proceeds to Kutztown, its destination. Since the stores of Allentown close at 5:30 p. m. except on Saturday evenings, persons residing east of Topton have ample time to make their trains after business hours. And since Topton is half-way between Allentown and Reading, it does not seem probable that persons residing west of that point along the East Penn Branch would care to go to Allentown to shop and transact other business regularly, even if they could go and return on later trains.

Reading being the larger town will naturally attract the business of the surrounding territory within a certain area. It appears from the record that the business from Topton west is tributary to Reading, and from Topton east more or less tributary to Allentown. No change in schedule of trains would likely affect this situation to any appreciable extent.

The Commission is, therefore, of the opinion that the petition of complainant for additional train service on the East Penn Branch of the Reading Railroad should be refused, and the complaint be dismissed.

#### ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full in-

vestigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its finding of fact and conclusions thereon, which said report is hereby referred to and made a part hereof :

*Now, to-wit, November 19th, 1914, it is ordered:* That the complaint in this proceeding be, and it is hereby dismissed.

By the Commission :

FRANK M. WALLACE, *Acting Chairman.*

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J. E. CALLAHAN, ET AL., v. ERIE RAILROAD CO.

*Discontinuance of trains—Station facilities—Accommodation of traffic.*

Complainants alleged that the discontinuance of operation of two passenger trains by the respondent, had left persons at Kennard station, Mercer county, without passenger service and without means of forwarding fragile parcel post matter. Complainants ask for the re-establishment of passenger service, the erection of a station building and the employment of an agent.

The evidence showed that the average passenger receipts on this line were 25 cents per train mile, and the cost of operation was 71.73 cents per train mile, and since the discontinuance thereof passengers had been carried on the local freight train, which was rarely operated on schedule; that the respondent provided a car for the storing of freight and a waiting room in a nearby house for passengers; and that the freight service is unsatisfactory.

*Held:*—While the amount of traffic is limited, the people about Kennard are entitled to reasonable and regular passenger service, and the proper facilities for and regular attention to their shipments of freight and express.

It was ordered: 1. The respondent should carry passengers on its local freight train in each direction once per day (except Sunday).

2. The said train should be operated on a schedule that would best accommodate the complaints.

3. The car used for storing freight and express and the waiting room shall be maintained.

4. A new station building and an agent are unnecessary.

5. The freight service should be improved.

COMPLAINT DOCKET NO. 189.

Report and Order of the Commission.

Filed April 17, 1914.

Decided November 18, 1914.

*Berne H. Evans*, for the Commission.

*Guy Thorne*, for the complainant.

*T. H. Burgess*, for the respondent.

COMMISSIONER TONE :

J. E. Callahan, C. G. Freeland and J. M. Little, as a committee representing the people at Kennard Station, complained that the Erie Railroad Company had discontinued the operation of passenger trains Nos. 219 and 220 between Greenville and Meadville, thus leaving the people at Kennard without passenger service and without means of forwarding fragile parcel post matter ; and stating that the freight and passenger business were both increasing at this station ; that it was the best paying station between Greenville and Meadville, and demanding that the railroad company maintain a station building and agent to accommodate and care for the traffic.

From the evidence submitted, it is found that Kennard is a community in Mercer County, having about twenty-five dwellings within a radius of one-half mile, and is a station on that portion of the main line of the Erie Railroad running northeasterly from Greenville to Meadville, the intermediate stations with distances of each, respectively, northeast of Greenville being, Kennard—4.9 miles, Atlantic—7.8 miles, Stony Point—13 miles, Geneva—19 miles, and Meadville, 26 miles ; that Shenango is a station about two miles southwest of Greenville ; that for some years previous to June, 1911, there was no passenger service furnished at Kennard Station ; that from June to November, 1911, Kennard passengers were carried on a local freight train ; that from November, 1911, to April 15th, 1914, passenger service was furnished by extending the run of a local passenger train previously operating between Leavittsburg, Ohio, and Shenango, Pennsylvania, northeasterly, from the latter point through Greenville, Kennard, Atlantic, et cetera, to Meadville, which operation between Shenango and Meadville was discontinued April 15th, 1914, from which time to May 15th, 1914, no passenger service was provided for Kennard, and from May 15th to the present time passengers have been carried between Greenville and Kennard on a local freight train, in each direction, once a day, scheduled to arrive at Greenville about 9:11 a. m.,

and depart at 2:10 p. m.; that this local freight was seldom operated on its schedule owing to delays caused by its handling and switching freight, and also by all other trains having the preference over the local freight; that the passenger service desired by the people of Kennard was accommodation to reach Greenville for one or two men before 7:00 a. m., for several scholars before 9:00 a. m., for others in time to transfer to a Bessemer & Lake Erie Railroad train leaving Greenville at 9:33 a. m. for Mercer, the county-seat, and proper service for return trips the same day, the train from Mercer arriving at Greenville at 4:47 p. m.; that the local passenger train operating between Leavittsburg, Ohio, and Meadville, Penna., for the months of April, July and October, 1913, and January, 1914, earned about twenty-five cents per train mile, and its operation was discontinued between Shenango, Greenville and Meadville, in order to reduce operating expenses; that the average cost of operating passenger trains per train mile was estimated to be seventy-one and seventy-three hundredths cents; that for the calendar year 1913, the total receipts from Kennard passengers amounted to \$381.06; the average number of passengers to and from Kennard riding in each direction on the local passenger train then operated was about three per day, and the passenger receipts amounted during the same period, from and to the stations at Atlantic, to \$2,212.30; at Stony Point to \$145.05; at Geneva, to \$2,794.65; that for the fiscal year ending June 30th, 1914, the freight receipts on traffic to and from Kennard amounted to \$2,509.94 for outbound carloads, \$352.88 for inbound carloads, \$76.41 for outbound L. C. L., and \$202.65 for inbound L. C. L., a total of \$3,141.88; other freight receipts being, at Atlantic—\$3,284.20, at Stony Point—\$1,687.11, at Geneva—\$5,206.43; that more or less of the freight at the stations named was to or from points off the line of the Erie Railroad, requiring a division of the freight receipts with connecting carriers; that for the year ending September 1st, 1914, the carload freight at Kennard Station comprised 12 cars of coal, 1 of salt, 1 of cement, 2 of fertilizer inbound, and 33 cars of lumber, 2 of cement block, and 116 cars of sand and gravel outbound; that delays occur in furnishing to the shipper of sand and gravel at Kennard, the weights of his shipments, the same being weighed at Shenango, thereby preventing his for-

warding B-L's and invoices to customers; that there is confusion between the shippers and train crews regarding local outbound L. C. L. freight and express, and in the furnishing B-L's therefor, due in part to such shipments being subject to the direction of the railroad company's agents at both Greenville and Atlantic; that a freight car has been side-tracked at Kennard for use in storing in and out-bound freight and express; is locked and the key for same kept at the general store near-by of J. M. Little; that a room in a house near the station is provided by the railroad company for use by passengers waiting on trains; that the mails are carried on through trains, being thrown off and caught, without stop, three times per day at Kennard; that express and parcel post mail matter can be forwarded from Kennard by the shipper, notifying the railroad company's agents at Greenville or Atlantic; that no notice is sent to consignees of inbound freight received at Kennard; that the residents of the community surrounding Kennard for several miles in each direction are entirely dependent upon the Erie Railroad for freight and passenger accommodations.

The evidence indicates some lack of attention by the respondent to the necessities of shippers of freight and express, and to the regularity of schedule in the operation of its train hauling passengers.

While the amount of the traffic is limited, the people about Kennard are entitled to reasonable and regular passenger service, and to proper facilities for and regular attention to their shipments of freight and express.

The respondent can adopt certain regulations, that, if made effective, will insure more prompt and systematic attention to outbound freight and express, to the returning of weights and issuing of bills of lading; and also that will, by relieving the local freight train of certain switching work, giving it some preference as to right-of-way, changing its schedule at starting point to allow it more time en-route, insure its prompt arrival at Kennard and Greenville. If the respondent make effective such regulations, it is believed the necessity of an agent will be obviated, and that the passenger traffic will be accommodated without the re-instatement of the local passenger train between Shenango and Meadville.



It is the opinion of the Commission, that, if the railroad company maintains the present car in proper order and condition for housing freight, has placed therein by its trainmen all inbound, and loaded therefrom all outbound L. C. L. freight and express, and continues the arrangement for use of a room in a neighboring house for sheltering passengers, a further station building and agent are not necessary; and that the railroad company should place all the freight and express business to and from Kennard under the direction of *one* of its agents, either at Greenville or Atlantic; require notices sent to consignees of inbound freight delivered to Kennard, and render promptly to shippers from the station bills of lading, and statements of weights of carload shipments; and further, that the railroad company shall carry passengers between Kennard and Greenville on its local freight train once per day, (Sunday excepted), in each direction, and operate said train on such a schedule that it will arrive at Greenville at 8:45 a. m., and leave Greenville at 5:10 p. m., thereby furnishing service to Kennard scholars attending school in Greenville, and residents of Kennard desirous of making a round trip during one day to Mercer, the county-seat; and maintain a record of the time of arrival in the morning at and of departure in the afternoon from Greenville of said train.

#### ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

*Now, to-wit, November 18th, 1914, it is ordered:* That the Erie Railroad Company maintain its facilities and service at Kennard Station in accordance with the directions contained in the report of the Commission above referred to, and so arrange its schedule as to carry out the directions of the Commission contained in said report, and that the said railroad shall report to the Commission once a month for six months a record of the time of arrival in the

morning, at, and of departure in the evening from, Greenville, of the train mentioned in said report.

By the Commission:

FRANK M. WALLACE, *Acting Chairman*.

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THE COMBINED COMMITTEE OF THE UNITED BUSINESS MEN'S ASSN., ET AL., v. PENNSYLVANIA RAILROAD CO., ET AL.

*Finding, Determination and Order of the Commission in Re Proposed Increase in Passenger Fares and Changes in Passenger Tariffs, to become effective December 15th and 20th, 1914.*

COMPLAINT DOCKET 315.

BY THE COMMISSION; DEC. 12, 1914.

I. The Commission having considered the complaints against the tariffs of passenger fares filed by certain railroad companies in Pennsylvania, to become effective December 15th, 1914, or thereafter, whereby fares of various classes are to be advanced and the sale of certain classes of tickets is to be discontinued, and, having held hearings to ascertain the nature of the proposed changes and the effect which the proposed tariffs will have upon the charges collected for passenger transportation, and also for the purpose of taking testimony as to the reasonableness and lawfulness of such charges, under the provisions of the Public Service Company Law, it is the judgment and finding of the Commission that the withdrawal from sale of the fifty and one hundred trip individual commutation tickets, which have been maintained for many years, would unreasonably increase the fares paid by persons who have found those tickets suited to their needs; that two or one quarter cents per mile is an unreasonably high basis for the charge for a ten trip ticket, and that the sixty trip monthly commutation ticket and the forty-six trip monthly school ticket should be valid for a period of one month, and the one hundred and eighty trip commutation ticket should be valid for a period of three months, all from the date of issue, instead of being valid for periods of one and three calendar months only, as heretofore proposed.

II. It is held that the proposed tariffs are unreasonable in the following particulars:

1. In the withdrawal from sale by the respondent companies of

the one hundred trip individual commutation ticket.

2. In the charge of more than two cents a mile for ten trip tickets.
3. In providing that the sixty trip monthly commutation and the forty-six trip monthly school tickets shall be valid only for the period of the calendar month in which such tickets are sold, and that the one hundred and eighty trip quarterly commutation tickets shall be valid only for three calendar months.

III. It is the opinion of the Commission that a reasonable scale and classification of the charges for suburban passenger transportation in Pennsylvania is one providing for the sale of :

1. One hundred trip individual tickets, sold at a rate not to exceed one and one-half cents per mile.
2. Ten trip tickets, good for bearer and persons accompanying bearer, sold at a rate not to exceed two cents per mile.
3. Sixty trip individual monthly commutation and forty-six trip individual monthly school, and one hundred and eighty trip quarterly individual commutation tickets at the scale of charges in the proposed tariffs.

IV. *And now, to wit*, December 12th, 1914, the carriers are accordingly hereby required to substitute for the passenger tariffs filed, to become effective December 15th (for the Baltimore and Ohio Railroad Company effective December 20th), other tariffs or supplements, covering the subjects and localities affected by the said proposed tariffs or supplements, providing :

1. For the sale of one hundred trip individual commutation tickets valid for a period of six months from the date of issue, the rate charged for these tickets not to exceed one and one-half cents a mile.
2. For the sale of ten trip tickets, good for bearer and persons accompanying bearer, valid for a period of three months from date of issue, the rate charged for these tickets not to exceed two cents a mile.
3. For the sale of sixty trip individual commutation tickets and forty-six trip school individual commutation tickets, each class of tickets valid for a period of one month from the date of issue, and for the sale of one hundred and eighty trip individual commutation tickets, valid for a period of three months from the date of issue.

To fulfill the requirements of this finding, determination and order, the respondent companies, to wit, the Pennsylvania Railroad Company, the Philadelphia, Baltimore and Washington Railroad Company, the Philadelphia and Reading Railway Company, and the Baltimore and Ohio Railroad Company, are hereby authorized to file, post and publish, effective December 15th, 1914, (for the Baltimore and Ohio Railroad Company, effective December 20th, 1914), upon one day's notice to the public and the Commission, new tariffs or supplements to the tariffs now on file with the Commission.

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BIRDSBORO STONE COMPANY v. PHILADELPHIA & READING RY. CO.

*Rates—Discrimination—Purpose for which commodity is used—  
Status of consumer—Service under substantially similar circumstances and conditions—Act of July 26, 1913, Art. III, Sec. 1, (b), P. L. 1387, and Art. III, Sec. 8, (a) and (b), P. L. 1393.*

Respondent's rate from Trap Rock, Pa., to Birdsboro, Pa., where it connects with the Pennsylvania Railroad, is 15c per net ton, or approximately \$7.50 per car, on shipments of crushed stone for commercial purposes destined to points on the Pennsylvania Railroad beyond Birdsboro. The per diem charge, payable by the respondent, on cars used in such shipments is 45c per car. The rate on the same stone for "railroad ballast" is \$1.50 per car between the same points, and, by arrangement with the Pennsylvania Railroad, no per diem charge is paid on cars used in the latter traffic.

Respondent admits that the latter rate is "subnormal," but contends that the difference in rate is lawful under Art. III, Sec. 1, (b) of the Public Service Company Law, which permits a classification of service and rates on the basis of the purpose for which the commodity is used.

Complainant asks that rates on stone for commercial purposes and for railroad ballast be made the same.

*Held:—*(1) The provisions of Art. III, Sec. 1, (b) of The Public Service Company Law are limited in their application by the provisions of Art. III, Sec. 8, (a) and (b). Different rates for the same service under substantially similar circumstances and conditions are discriminatory under the latter section and cannot be justified under the former.

(2) The services of transporting crushed stone for commercial purposes and for "railroad ballast" are rendered under substantially similar circumstances and conditions. The fact that a railroad company is the shipper or consignee in the one case, or the fact that crushed stone for commercial purposes does or does not come into competition with "railroad ballast,"

does not affect the service rendered. A rate for either one, lower than the rate charged for the other, is discriminatory and gives an unreasonable preference.

(3) The legality of the arrangement by which the respondent is relieved from paying the regular per diem charges, not decided.

#### COMPLAINT DOCKET NO. 210, 1914.

Report, Opinion, Decision and Order of the Commission.

Submitted May 19, 1914.

Decided December 4, 1914.

COMMISSIONER JOHNSON:

#### FINDING OF FACTS.

The complainant in this case has a quarry at Monocacy, Berks County, Pa. Monocacy is located on the Pennsylvania Railroad about  $1\frac{1}{2}$  miles east of Birdsboro, through which the lines of both the Pennsylvania Railroad and the Philadelphia and Reading Railway pass. Trap Rock is a station about  $1\frac{1}{2}$  miles southwest of Birdsboro on the line of the Wilmington and Northern Railroad, which is operated under a lease by the Philadelphia and Reading Railway Company. At Trap Rock the John T. Dyer Stone Company has a quarry and crushes rock which is sold in competition with the rock crushed at Monocacy by the complainant.

The rates now in force from Trap Rock to Birdsboro are 30 cents per net ton for local delivery at Birdsboro, 15 cts. per net ton when destined to points on the Pennsylvania Railroad via Birdsboro, and \$1.50 per car on "railroad ballast." The rates charged by the Pennsylvania Railroad from Monocacy to Birdsboro are the same as the rates charged by the Reading Railway from Trap Rock to Birdsboro, i. e., 30 cts. per ton for local delivery at Birdsboro and 15 cts. per ton for consignees at points on the Reading Railway line beyond Birdsboro, while the charge to Birdsboro on ballast purchased by the Philadelphia and Reading Railway is \$1.50 per car.

The complainant petitions the Public Service Commission to order the discontinuance of the rate of \$1.50 per car from Trap Rock to Birdsboro on railroad ballast, and to establish the same rate upon railroad ballast as is charged upon crushed rock purchased for other uses. The complainant does not petition to have the rate upon ballast rock from Monocacy to Birdsboro increased

from \$1.50 per car to 15 cents per ton, but it is apparent from the record that the complainant would expect the rates to Birdsboro to be the same from Monocacy as from Trap Rock.

The complainant does not question the reasonableness of the rates of 15 cents per ton on crushed rock from Trap Rock (or Monocacy) to Birdsboro for shipments to points beyond Birdsboro. The rate of 30 cents per ton from the quarries to Birdsboro on rock for local consumption is stated in the complaint to be unreasonable, but in the hearing upon the complaint no evidence was submitted concerning the unreasonableness of the 30-cent rate.

The respondent in the testimony and in his brief admits that the rate of \$1.50 per car from Trap Rock to Birdsboro is a "sub-normal" rate, and it may be assumed from the testimony and argument that a charge of \$1.50 per car for the switching movement from quarry to the tracks of the connecting railroad at Birdsboro is an unremunerative charge.

In support of this rate of \$1.50 per car on "stone, railroad ballast, from Trap Rock to Birdsboro" the attorney for the defendant basing his statement upon the testimony of the principal witness for the defendant, alleges that there is no competition between ballast rock purchased by a railroad company and crushed stone purchased by other buyers for commercial purposes; that ballast is sold to railroad companies at a price including delivery to the purchasing railroad company upon its rails at the point nearest to the quarry from which the rock is obtained; that "a quarry located beyond the line of the railroad company which is buying the ballast must assume the transportation charges to the rails of such purchasing company in order to compete with a local quarry, the latter quarry having no freight to pay"; that the rate of \$1.50 per car on ballast rock consigned from Trap Rock to the Pennsylvania Railroad Company at Birdsboro was established prior to 1900, since which time the Dyer Company has been able to sell large quantities of ballast to the Pennsylvania Railroad Company; that this sale of ballast rock has enabled the quarry to produce crushed rock at a lower cost for commercial use; that ballast rock moves regularly in large volume from the Trap Rock quarry to the Pennsylvania Railroad Company at Birdsboro, the shipments for 1913 averaging about 13 cars per day;

and that the defendant is relieved by the Pennsylvania Railroad Company from the payment of per diem charges on cars supplied for the transportation of the ballast rock, the per diem payable by the defendant for the use of "foreign cars" required for the movement of rock consigned to other purchasers than the Pennsylvania Railroad Company being 45 cents per car.

#### OPINION.

The issue in this case raises the question whether a lower freight rate on crushed rock consigned to a railroad company than on the same article when consigned to other purchasers is lawful under the Pennsylvania Public Service Act. Is it lawful for the defendant company to charge \$1.50 per car on "stone, railroad ballast," from Trap Rock to Birdsboro, and to charge fifteen cents per ton (about \$7.50 per car) on the same kind of material when transported between the same points for consignees who do not use the rock for railroad ballast? Is this discrimination reasonable and lawful?

Counsel for the defendant cites in support of the special rate of \$1.50 per car on railroad ballast Article III, Section 1, paragraph (b) of the Public Service Company Law of July 26, 1913, which permits the carrier

"To employ, in the conduct and management of its business, suitable and reasonable classifications of its service, patrons, and rates; and such classification may, in any proper case, take into account the nature of, the use, and quantity used, the time when used, the purpose for which used, the kind, bulk, value, and facility of handling of commodities, and any other reasonable consideration."

It is contended by the defendant's counsel that the carrier is authorized by this section of the law to classify a commodity with reference to "the purpose for which used" and that "stone, railroad ballast" may be given a different rate than is charged crushed rock not used for railroad ballast. It should be noted, however, that whatever authority is given the defendant carrier by paragraph (b), Section 1, Article III of the Public Service Company Law is necessarily limited by Section 8 of Article III which provides that

"It shall be unlawful for any public service company—

"(a). To charge, demand, collect, or receive, directly or indirectly, by any special rate, rebate, drawback, abatement, or other

device whatsoever, from any person or corporation, for any service rendered or to be rendered, a greater or less compensation or sum than it shall demand, charge, collect, or receive from any other person or corporation for a like and contemporaneous service under substantially similar circumstances and conditions.

“(b). To make or give any undue or unreasonable preference or advantage in favor of or to any person or corporation or any locality, or any particular kind or description of traffic or service, in any respect whatsoever, or to subject any particular person or corporation or locality, or any particular kind or description of traffic or service, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.”

Are the services of transporting crushed rock for railroad ballast and crushed rock for other uses performed under substantially similar circumstances and conditions? Does the special rate on railroad ballast constitute an undue or unreasonable preference?

The record in this case shows that the defendant, during the year 1913, hauled from Trap Rock to Birdsboro 4,323 carloads of ballast rock for the Pennsylvania Railroad Company, at a freight rate of \$1.50 per car, and 3,906 carloads of crushed rock for other consignees at a rate of 15 cents per ton. The tonnage of the ballast rock upon which the rate of \$1.50 per car was charged was somewhat larger than the tonnage of rock for other uses than ballast, upon which the rate of 15 cents per ton was imposed, but the difference in tonnage was not sufficient to justify the difference in rates. A carload is the standard unit of service in the transportation of such material as crushed rock; and, the rates charged whether per car or per ton being for the movement of carload quantities, there seems no justification for any marked difference in the carload rates accorded larger and smaller shipments of such a commodity as crushed rock.

The arrangement between the defendant and the Pennsylvania Railroad Company providing for the waiver of the collection of per diem charges on cars used for the transportation of railroad ballast somewhat reduces the expenses incurred by the defendant company in switching ballast from Trap Rock to the line of the Pennsylvania Railroad at Birdsboro. This arrangement, if lawful, would not justify such a wide difference as now exists in the rates on ballast and other crushed rock. The legality of the arrangement between the Philadelphia and Reading Railway Company and the Pennsylvania Railroad Company as to the waiver



of the per diem charges in question not being at issue in the present proceedings, no opinion is expressed thereon.

The provisions of Section 8 of Article III of the Pennsylvania Public Service Company Law are in substance and effect the same as Sections 2 and 3 of the present Interstate Commerce Act. The interpretation given those sections of the federal statute by the Interstate Commerce Commission and the United States Supreme Court indicates clearly the application of Section 8 of Article III of the Pennsylvania statute to the question at issue in this proceeding.

It was held by the Interstate Commerce Commission in *Capital City Gas Co. v. Central Vermont Railway Co.* (11 I. C. C. Reps. 104) that

"In transporting coal from Norwood to Montpelier at 90 cents a ton for 'railroad supply,' the same service is performed and the circumstances and conditions of carriage are the same in every material respect as in transporting coal at \$1.85 per ton for complainant and other consignees . . . . . and that the difference in rates is a violation of the statute."

In support of this conclusion, the Interstate Commerce Commission cited the decision of the United States Supreme Court in *Wight v. United States* (167 U. S. 512, 42 L. Ed. 258) which held that the phrase "under substantially similar circumstances and conditions" in Section 2 of the Interstate Commerce Act "refers to the matter of carriage and does not include competition," and that "it was the purpose of the section to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor."

It would seem from this that neither the absence or presence of competition between ballast rock and other crushed rock nor the different uses made of the rock by a railroad company and other consignees can affect the circumstances and conditions of the service of transporting carload quantities of crushed rock from Trap Rock to Birdsboro.

The decision of the United States Supreme Court in *Interstate Commerce Commission v. Baltimore and Ohio Railroad* (225 U. S. 326) is largely determinative of the conclusion to be reached in the present case. The question before the Supreme Court was

as to the validity of the finding of the Interstate Commerce Commission in the case of *Hitchman Coal Co. v. Baltimore and Ohio Railroad et al.* (16 I. C. C. Reps. 512) in which the commission held, among other things, that it was unlawful to charge a lower rate on coal for railroad fuel than on coal for commercial uses. The reasoning of the Interstate Commerce Commission was that:

"The custom has been somewhat general in years gone by for carriers to accord to each other preferential rates lower than were charged for the same service to the shipping public. There is, however, no warrant in the common law for the theory that a carrier as a shipper over the line of another carrier may enjoy or be given a preferred status. There is no intimation in the act to regulate commerce that a carrier as a shipper has or may be given a status that is different from or more advantageous than that given to all other shippers. It has been suggested in justification of preferential rates on railway fuel coal that that product affords a large tonnage for the carrier that transports the coal; that it is in a sense a reciprocal arrangement; and that the shipper carrier thereby secures its fuel at a lower cost. Neither of these suggestions is persuasive. The practice can not be upheld without removing the very corner stone of the act, which seeks to abolish and prevent unjust and undue discriminations and preferences. If a carrier may have lower transportation rates than other shippers just because it tenders a large tonnage, why may not the mine, mill or factory that offers a large tonnage have lower rates than the mine, mill, or factory that offers a smaller tonnage?"

Upon appeal to the Commerce Court, the carriers secured an injunction against the enforcement of the decision of the Commission that the rates on coal for railroad fuel and for other purposes must be the same; but the Supreme Court overruled the Commerce Court and sustained the finding of the Interstate Commerce Commission. The reasoning of the Supreme Court was as follows:

"The fact that a railroad is the shipper or consumer is not a circumstance or condition that affects the carriage, nor can the different uses to which the coal may be put; and it would seem necessarily that any other extraneous condition or circumstance could have no greater potency. Once depart from the clear directness of what relates to the carriage only, and we may let in considerations which may become a cover for preferences."

#### DECISION.

The facts of record in this case indicate that the circumstances and conditions attending upon the transportation from Trap Rock

to Birdsboro of crushed rock for railroad ballast and for other uses are substantially similar. The service performed by the defendant in transporting rock for the railroad company purchasing ballast is not materially different from the service performed for other buyers of crushed rock, and is not a factor that may lawfully be considered by a carrier in fixing freight rates. The car-load rate on crushed rock transported from Trap Rock to Birdsboro for delivery to consignees at points beyond Birdsboro must be the same for all shippers. No opinion is here expressed as to the reasonable relationship between the rate from Trap Rock to Birdsboro on crushed rock for local delivery in Birdsboro and the rate from Trap Rock to Birdsboro on rock for shipment to points beyond Birdsboro. The reasonableness of the rate on rock for local delivery at Birdsboro is not at issue in this proceeding.

It is held that a rate from Trap Rock to Birdsboro on "rock, railroad ballast" different from the rate charged upon crushed rock purchased for uses other than as railroad ballast is unlawful. An order will issue requiring rates to be adjusted in accordance with this finding.

#### ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

*Now, to-wit, December 4th, 1914, it is ordered:* That the Wilmington and Northern Railroad Company and the Philadelphia and Reading Railway Company so adjust their rates and tariffs that the rate from Trap Rock to Birdsboro on "rock railroad ballast" shall not differ from the rate charged between said points upon crushed rock purchased for uses other than as railroad ballast, and that said adjustment and change in rates be made so as to take effect on or before January 15th, 1915.

By the Commission:

FRANK M. WALLACE, *Acting Chairman.*

ROBERT W. MEHARD, ET AL., v. NEW WILMINGTON WATER  
SUPPLY CO.

*Rates—Service—Water supply—Filing of tariffs and schedules—  
Charging of rate other than that filed.*

Complainant alleges that the rates of the respondent (a flat rate of \$10.00 per house without bath, and \$20.00 per house with bath and closet) are unreasonable and unjust; and that the service of the respondent is unsatisfactory.

The evidence shows that the rates now charged by the respondent are not those which are on file with the Commission, but are the rates charged prior to the filing of its tariffs with the Commission; that the respondent has a paid in capital of \$23,150.00, has no mortgage or bonded indebtedness, has paid a 6 per cent. dividend for some years, but has no sinking fund or renewal reserve, and pays no salaries except to its engineer and its treasurer; that it has an antiquated system of bookkeeping; that it has no accurate map of its system; that the pressure in some parts of its system is inadequate and its fire plugs are not of standard size; that at times of freshet its sources of supply are contaminated; and that the State Department of Health has recently made recommendations with a view to improving the quality of its water.

*Held:* 1. The rates charged are reasonable. The respondent, however, by posting and filing its schedules of rates and not putting them into effect, has not discharged its duty to its patrons and the public.

2. The respondent shall improve its facilities and service as indicated in the order attached, and shall report its improvements, etc., to the Commission.

COMPLAINT DOCKET No. 190.

Report and Order of the Commission.

Submitted April 23, 1914.

Decided December 4, 1914

COMMISSIONER BRECHT:

Consumers of the New Wilmington Water Supply Company, located in New Wilmington, Lawrence County, have filed a complaint against the rates and service of the aforesaid company, alleging that the rate of forty cents per thousand gallons for patrons who use 25,000 gallons or less a quarter is unjust and unreasonable; that the rule in the schedule of respondent which provides that where meters have not yet been installed the old flat rate will be charged is discriminatory and unjust, inasmuch as no provision is made for the installation of meters and no reason given why

meters may not be duly installed; that the service furnished and maintained by respondent is not adequate for the "accommodation and safety" of its patrons and the public; that the pipes put down by the company are in some instances too small for the proper distribution of the water to consumers; that owing to the numerous dead ends in the distribution system filthy and unwholesome water is furnished at certain times; that the fire plugs used by the company are not of standard make and could not be used to attach iron couplings in the event of a fire calling for outside assistance; that the cesspool of the superintendent's house is within fifty feet of one of the wells from which water is taken into the reservoir; that the surface water, on account of defective appliances, flows into the reservoir contaminating the water and rendering it unfit for domestic purposes.

The respondent in his answer sets forth that the company has not tried to enforce the new schedule to which complainant objects, but continued during the current year to collect for water at the old rates which have been in use practically since 1893, and against which there have been no objections filed; that the rates of the new schedule, if enforced, would not have yielded sufficient revenue to maintain adequate service and pay a reasonable return upon the investment, and therefore the company does not oppose the issuance of an order enjoining the use of the new schedule, but petitions to be permitted to withdraw the schedule in question and to be allowed to continue charging for water at the old rates; that the service and facilities of the company have been in all respects reasonably adequate and sufficient for the accommodation and safety of its patrons and the public; that the Department of Health of the State issued a decree, dated September 21, 1914, approving the quality of the water but requiring the company to have prepared and to submit to the department for approval plans in detail for the extension and improvement of its reservoir and distribution system; that a competent engineer has been engaged to prepare the aforesaid plans and to carry into effect the order of the Department of Health; that only reasonable time is requested to prepare these plans when the company will submit to this Commission details of the proposed improvements which it is believed will meet all criticisms which have been directed against its service; and that in the meantime it joins in the prayer of the peti-

tioner asking for the disapproval of the new schedule of rates filed some time ago with the Public Service Commission.

Complainant accordingly made application at the hearing for permission to amend his complaint against rates so as to apply to the old rates, the rates that are now charged and collected, and that were in effect at the time when the complaint was formerly made. Permission was granted and the complaint was made broad enough to include the old rates.

In this proceeding the petitioners pray that respondent be required:

(1) To amend its schedule of rates and regulations to the end that they may be just, reasonable and in no way discriminatory.

(2) To supply and maintain such service that shall in all respects be reasonably adequate and sufficient for the accommodation and safety of its patrons and the public.

(3) To improve its facilities and to install such new facilities as will remove the defects complained of and correct such other defects as may appear to the Commission.

The following facts are taken from the record in this case: New Wilmington is a small borough of about 800 people and the seat of a college of approximately 300 students. The reservoir of respondent is located outside of the borough limits and gets its supply of water from several wells and springs within a distance of 200 or 300 feet from it. The capacity of the reservoir is said to be 300,000 gallons.

The water is supplied from the reservoir through an 8-inch main and distributed through the business section of the town principally in 8-inch and 6-inch pipes. Outside of that area 4-inch, 2-inch and 1¼-inch pipes are used, although on some streets pipes are used in the distribution system that are only 1-inch and ½-inch in diameter.

About 50 or 60 feet from one of the wells used in supplying water is a cesspool connected with the house occupied by the superintendent of the water company. The plumber of the borough testified that he considered this cesspool a menace to the health of the town, but had never reported it to the local Board of Health or to the Health Department of the State, nor had he ever heard of anyone else who had made complaint against it. There are times when the water is not fit for domestic consumption be-

cause of its offensive odor and bad taste. This is found to be the case in the spring of the year after the snow melts, after very heavy rains, and after the sewers of the town are flushed. Some of this trouble is also ascribed to the number of dead ends found in the distributing system and the poor circulation of the water resulting therefrom. No complaints were ever filed with the company on account of the poor quality of the water except in the spring of 1914, when a very high freshet carried surface water into the springs and polluted them. As soon as the matter was called to the attention of the company the springs so affected were shut off and the trouble corrected. Certificates from two prominent local physicians state in effect that they consider the water furnished by respondent to be pure and wholesome, and do not know of a single case of sickness or disease that has occurred in the Borough of New Wilmington that can be attributed to the water that is used.

In a few cases the service has not been satisfactory. The public schools have not at all times sufficient water to keep the closets working properly; and in the case of a fire along a 2-inch line the pressure of the water was so low that it would not throw a stream ten or fifteen feet high. There is also some trouble to get a sufficient quantity of water along a few streets where the supply is furnished through 1-inch pipe.

The company filed with the Commission a schedule of rates for meter service in June, 1914, to supersede the flat rates then in effect. The meter rates were fixed at 40 cents per 1,000 gallons for consumers using 25,000 gallons or less a quarter; 35 cents per 1,000 gallons for consumers using from 25,000 to 50,000 gallons per quarter; 30 cents when using over 50,000 and less than 100,000 gallons, and 25 cents when over 100,000 gallons were consumed per quarter. Sixty meters were installed but were not used on account of the general protest that came from the consumers against the proposed meter rates. The company therefore continued to charge and collect the old rates for flat service, from all but five patrons, instead of attempting to put the new schedule of rates into effect. Under the old service a flat rate of \$10.00 per house is charged when there is no bath, and \$20.00 per house having a bath and water closet.

The New Wilmington Water Supply Company has a capital

stock of \$23,150.00 which has been all paid in. It has no mortgage or bonded indebtedness, and last year and for some years past paid a six per cent. dividend. Its gross receipts in 1913 were \$2,808.23 and its gross earnings between \$3,200.00 and \$3,500.00. In 1913 it paid for operating expenses \$638.12, for taxes \$126.67, for construction \$739.07, and had a cash balance left for the year of \$481.49. There is no sinking fund maintained, and nothing set aside to take care of depreciation in the plant. No salaries are paid except to the treasurer and engineer. The company furnishes service for 201 consumers and 24 fire plugs.

It appears from the evidence that the respondent has been required by the State Department of Health to make certain specific changes and improvements in its plant and equipment, with a view of improving the service, that the quality of the water has been analyzed and duly approved by the health authorities of the State, that the flat rates now and heretofore charged and collected are not excessive, unreasonable nor discriminatory, that in posting and filing a schedule of rates and not putting it into effect, the company has been derelict in the discharge of a duty which it owes to its patrons and the public, that its system of book-keeping is obsolete and unsatisfactory, and that the respondent has no record or even approximate figures of the physical valuation of its plant, nor a correct map in its possession of the highways occupied by its distributing system, which shows the character of the pipes laid on the different streets.

In view of the foregoing facts the Commission is of the opinion that the New Wilmington Water Supply Company ought to be required to give attention to the following details in the administration of its plant:

1. To submit to this Commission a copy of the plan showing the improvements in its plant and plan facilities which were made in pursuance to the decree of the Department of Health under date of September 21st, 1914.
2. To place on file with this Commission a map of the Borough of New Wilmington, showing on it as of December 1st, 1914, all the lines of pipes and their respective dimensions that have been installed in its distributing system.
3. To post in its office and file with this Commission its schedule or schedules of rates and regulations which it will follow in the transaction of its business.



4. To have an appraisal made of the physical valuation of its water plant now established and operated at New Wilmington, and to submit duly certified copies of such inventory to this Commission.
5. To revise its system of book-keeping so that it will conform in all essential points with the suggestions which they may obtain from the Bureau of Accounts & Statistics of the Public Service Commission.
6. To forward to this Commission a correct copy of its balance sheet annually for the ensuing two years beginning January 1st, 1915.
7. To flush the fire plugs at least four times a year and to maintain a type of fire plug to which any standard fire hose can be attached.
8. To install an automatic pressure gauge at the reservoir and at the highest elevation in the town receiving service, and keep a weekly record in its office for inspection of the pressure at those two designated points.
9. To adopt some plan which will not make it possible for the surface water to flow in the different springs at any time or under any conditions of weather, and to report the character of such protection to this Commission on or before January 15, 1915.

An order will be so drawn.

#### ORDER.

·This case being at issue upon complaint and answer filed, and having been duly submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof :

*Now, to wit, December 4, 1914, the New Wilmington Water Supply Company is hereby ordered to*

1. Submit to this Commission a copy of the plan showing the improvements in its plant and plant facilities which were made in pursuance to the decree of the Department of Health under date of September 21st, 1914.
2. Place on file with this Commission a map of the Borough of New Wilmington, showing on it as of December 1st, 1914, all the lines of pipes and their respective dimensions that have been installed in its distributing system.
3. Post in its office and file with this Commission its schedule or schedules of rates and regulations which it will follow in the transaction of its business.

4. Have an appraisal made of the physical valuation of its water plant now established and operated at New Wilmington, and to submit duly certified copies of such inventory to this Commission.
5. Revise its system of book-keeping so that it will conform in all essential points with the suggestions which they may obtain from the Bureau of Accounts & Statistics of the Public Service Commission.
6. Forward to this Commission a correct copy of its balance sheet annually for the ensuing two years beginning January 1st, 1915.
7. Flush the fire plugs at least four times a year and to maintain a type of fire plug to which any standard fire hose can be attached.
8. Install an automatic pressure gauge at the reservoir and at the highest elevation in the town receiving service, and keep a weekly record in its office for inspection, of the pressure at these two designated points.
9. Adopt some plan which will not make it possible for the surface water to flow in the different springs at any time or under any conditions of weather, and to report the character of such protection to this Commission on or before January 16, 1915.

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CITY OF WILKES-BARRE *v.* LEHIGH VALLEY RAILROAD CO., ET AL.  
*Crossings—Viaduct—Apportionment of cost.*

*In re petition of City of Wilkes-Barre for the approval of an overhead bridge from Kidder street to Butler street in said city, across the tracks, etc., of the Lehigh Valley Railroad Co., the Delaware and Hudson Co., and the Central Railroad Co. of New Jersey.*

In 1906 the parties hereto entered into negotiations for the construction of a viaduct over the tracks of the respondent companies in the neighborhood of Butler street in Wilkes-Barre. The proposed viaduct was to cost \$72,500.00, of which the L. V. R. R. Co. offered to pay \$20,000.00, the D. & H. Co. \$13,750.00, the C. R. R. Co. of N. J. \$13,750.00, and the city the balance. The project was later abandoned.

The petitioner now asks approval of a proposed viaduct at approximately the same location. It will connect portions of the city of 5,000 and 10,000 population which now have no convenient place for crossing.

The plans, as drawn by the engineers for the city, have been altered to accord with suggestions made by the engineers for the companies, and the revised plans have been approved by the Commission's engineer. The cost of the viaduct, constructed according to these plans, will be approxi-

mately \$87,000.00, and the petitioner asks that the respondents pay the same percentage thereof which each had offered to pay in 1906. The respondents claim that their offers in 1906 were cash offers and did not bind them to pay a similar proportion at another time in the future; and that since said petition does not provide for the abolition of a grade crossing, but for a new crossing on a proposed new street, the major portion of the cost should be borne by the city.

*Held:* 1. A Certificate of Public Convenience should issue approving the proposed plans.

2. The fact that the crossing is built chiefly for the benefit of the city does not exempt the companies from their share of responsibility in making the improvement. Furthermore, the companies will benefit directly and indirectly from the erection of the viaduct, and should bear a fair proportion of the expense.

3. The expense of said viaduct shall be paid as follows: 40 per cent. by the City of Wilkes-Barre, 25 per cent. by the L. V. R. R. Co., 17½ per cent. by the D. & H. Co. and 17½ per cent. by the C. R. R. Co. of N. J.

#### APPLICATION DOCKET NO. 27, 1914,

#### Report and Order of the Commission.

Submitted March 3, 1914.

Decided October 23, 1914.

#### COMMISSIONER BRECHT:

This is a proceeding in which the City of Wilkes-Barre has filed a petition with the Public Service Commission, asking to be given permission to construct or have constructed a viaduct 1,350 feet long and 50 feet wide over the tracks of respondent companies in the City of Wilkes-Barre at a point designated as an extension of Butler street.

The said extension of Butler street begins at a point on North Pennsylvania avenue within a few feet from where Butler street now ends, and extends from the west side of the railroad tracks to Kidder street, near Pearl street on the east side of said tracks.

In the first instance, when the application was filed the petitioner asked the commission

1. To authorize the construction of a viaduct over respondent's railroad tracks at or near Butler street.
2. To determine upon the exact location and particular point of crossing.
3. To determine, after due notice had been given and a hearing held for that purpose, the proportionate share of expense each of the parties in interest should bear.

4. To permit the City of Wilkes-Barre to construct the highway bridge over the tracks of the railroad companies.

At a hearing held on April 9th, 1914, all the railroad companies concerned were represented, and agreed as the record shows, to the necessity for an overhead structure, and upon the proposed location for the same. The City of Wilkes-Barre was advised to prepare plans in detail and submit the same to the railroad companies and secure their approval of them if possible; also to file copies of the plans and specifications and of the agreement with the respondent companies, if one was reached, with this Commission.

At a subsequent hearing held before the Commission July 23d, 1914, it appeared that the plans and specifications prepared by the City of Wilkes-Barre met with objections from the engineers of the railroad companies. The general plan of location was approved, and the location of the piers was satisfactory, but the "design of the bridge" in its detail structure was considered too weak, and therefore regarded as not being safe. Whereupon the city agreed that it would direct its engineers to change the plans so as to make them conform in every respect to the suggestions of the railroad companies, and submit the revised plans within a few days thereafter to the said companies. It was offered in the record that the plans so changed "will be perfectly satisfactory" to the railroad interests. It was also agreed that the City of Wilkes-Barre may proceed at the proper time with the construction of the viaduct. All other questions involved in the proceeding under the law appearing to have been amicably determined, the only point remaining for adjudication, therefore, was an equitable apportionment of the expense of the construction of the crossing.

But on the 10th day of August, 1914, the Central Railroad Company of New Jersey, lessee, filed additional "requests before the commission, objecting to the proposed alterations in the plans which were filed in the first instance by the City of Wilkes-Barre, giving as a reason "that such alterations would be inequitable and illegal."

Upon the question of revising the plans and specifications the Superintendent of the Department of Streets and Public Improvements of Wilkes-Barre testified that "All of these changes

I made at the request of Mr. Yates." (The engineer of the Central Railroad Company of New Jersey.) All the changes made in the plans were made with the knowledge and consent of the engineer of the Central Railroad Company.

The plans in question were also submitted in the regular order of procedure to the engineer of this Commission for approval. In his examination into the merits of the case he went to Wilkes-Barre and made an inspection of the proposed site of the viaduct. He reported the location as being favorable to the construction of an overhead crossing, and subsequently recommended the approval of the amended plans.

The City of Wilkes-Barre is divided by Market street, extending east and west, into North and South Wilkes-Barre, and longitudinally into an eastern and western division by the tracks of the Central Railroad of New Jersey, the Delaware and Hudson Railroad, and the Lehigh Valley Railroad. These railroads run practically parallel in North Wilkes-Barre, and at the site of the proposed viaduct the three railroad companies own a combined right-of-way about five hundred feet wide. At that point the Central Railroad Company of New Jersey has two tracks and a right-of-way fifty feet in width; the Delaware and Hudson Companies has two tracks and a forty-and-a half foot right-of way; the Lehigh Valley Railroad Company has two tracks, a number of sidings, and a right-of-way four hundred and three feet wide.

The section of Wilkes-Barre directly affected by this application is that portion of the city lying north of Market street and commonly known as North Wilkes-Barre. The population of that section, according to the petition, is about sixteen thousand or nearly one-fourth of the whole population of the city. About five thousand of these people live on the east side of the railroad tracks and eleven thousand on the west side.

From Market street to the extreme northern limit of the city it is about ten thousand feet. In this entire distance of practically two miles there are but two highway crossings over the tracks of the railroads. These crossings are located respectively at Scott street and Conyngham avenue, and with the exception of the Lehigh Valley overhead crossing at Scott street, are grade crossings. Scott street is two thousand one hundred and three feet north of Market street, and Conyngham Avenue four thousand two hundred and nineteen feet north of Scott street.

Conyngham avenue, being a cross-town street, is traveled little, because of the sparsely settled districts which it connects in the northern end of the city, neither of which is located on a thoroughfare leading directly to the center of the town. Scott street is the main thoroughfare and apparently the only one by which the east section of North Wilkes-Barre can reach the business portions of the city. As already stated, Scott street is crossed at grade by the Central Railroad of New Jersey and the Delaware and Hudson Railroad, and on an overhead construction by the Lehigh Valley Railroad.

Two thousand one hundred and seventy-five feet north of Scott street and terminating on North Pennsylvania avenue on the west side of the railroad tracks is Butler street. In 1913, councils of the City of Wilkes-Barre passed an ordinance providing for the extension of Butler street from North Pennsylvania avenue on the west of the railroad tracks across the railroads to Kidder street near the corner of Pearl street on the east side. The Butler street extension, therefore, is located about half way between Scott street and Conyngham avenue, and is the site selected for the proposed viaduct.

This point has been selected by the city, it is alleged, because of the large number of persons from the east side who daily cross the railroad tracks at that place in going to and from their place of work. Those persons are largely employed in a number of industries located on or near Butler street on the west side, and include a number of women employees who work in the silk mill in that vicinity. The nearest street which these people can travel between their homes and place of employment is Scott street; if they would go by that route they would have over three-fourths of a mile farther each way than by the path they now travel, over the private rights-of-way of the railroad companies at Butler street. The extension of Butler street and the construction of a viaduct at that point, it is contended, would remove a constant source of menace to the life and limb of persons residing in that section of the city.

In 1906 the City of Wilkes-Barre entered into negotiations with the railroad companies in interest in this proceeding, for the construction of a viaduct over the railroad tracks in the neighborhood of Butler street. Plans were made and an agreement en-

tered into for an overhead crossing which was to cost \$72,500. Of that amount, the Lehigh Valley Railroad Company agreed to pay \$20,000.00; the Delaware & Hudson Company \$13,750.00; the Central Railroad of New Jersey \$13,750.00; and the City of Wilkes-Barre the remainder, which amounted to \$25,000.00. The project, however, fell through, and the viaduct was not built.

Several other attempts were made subsequently to get together in the matter, but nothing definite was accomplished. In March, 1914, a petition seeking relief was filed by the City of Wilkes-Barre with this Commission. After a preliminary hearing was held by the Commission, the City of Wilkes-Barre, agreeably to all parties in interest, was permitted to prepare plans and to advertise for bids. A number of bids were received, the lowest of which fixed the cost of constructing the viaduct at \$82,788.20. The changes subsequently made in the details of the plan by request of the engineers of the respondent companies will increase the amount of the bids about 5%, making the lowest bid in round numbers \$87,000.00. Altogether eleven bids were received, ranging from \$82,788.20 the lowest, to \$128,417.10 the highest.

The petitioner contends that the railway companies should pay two-thirds and the City of Wilkes-Barre one-third of the cost of construction. This division of the cost is based upon the respective amounts the respondent companies offered to pay in 1906 toward the structure that was then planned to cost \$72,500.00. The amount offered by the Lehigh Valley Railroad Company then, was equal to twenty-seven and a fraction percentum of the total cost, the amount offered by each of the other companies about nineteen percentum, making a total offer of approximately sixty-six and two-thirds percentum of the cost.

The railroad companies, however, hold that the money offered in 1906 was a cash offer, and was not intended then, nor ought it to be considered now, in the light of contributing a proportionate share of the expense. The companies offered and held themselves responsible to pay a certain specified amount in cash, but in no wise entered into an agreement with the city to assume a certain percentage or proportion of the cost of the viaduct under consideration at that time. This version of the offer originally made was admitted by the superintendents of the streets of Wilkes-Barre to be correct.

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In the present case, as appears from the record, the Lehigh Valley Railroad Company is willing to renew its cash offer made to the city in 1906, and furthermore, it will also waive all claim upon it for damages to its property. These damages, according to the figures of the company's engineers, would amount to \$28,380.00. However, should the proposition of the Lehigh Valley Railroad Company not be acceptable, and an attempt made to impose some of the land damages to the adjacent private property upon it, then it will feel justified to withdraw its offer. The record also shows that both the Delaware & Hudson Company and the Central Railroad Company of New Jersey are willing to renew the cash offer each of them originally made in 1906.

In a general way the amount of cash offered in 1906 to the City of Wilkes-Barre by the respective railroad companies in interest, may be taken as a basis in arriving at an equitable division of the costs, since it is reasonably probable that each offered to contribute in proportion to its own equity in the matter. Each company then offered a specified sum in cash, and gave permission to the city to occupy its right-of-way without asking for any damages to property. There has been no material change in the situation since then, and substantially the same problem confronts the parties to-day. The rights-of-way of the railroad companies, the location and character of the viaduct, the number of streets and grade crossings in that section of the city are all practically the same as they were when the offer of the respondents was made in 1906. The only difference of any moment is found in the fact that the present plan provides for a somewhat longer and heavier structure, costing in round numbers about \$15,000.00 more to construct.

It is contended by the railroad companies that inasmuch as the petition does not provide for the abolition of an existing grade crossing, but for the construction of a new crossing on a proposed new street, the major portion of the cost should be borne by the city. This, it is averred, is more especially true since the bridge is built chiefly for the accommodation of a limited number of operatives employed in the industries in that section of the town and not for the general traffic of the community at large.

The contention that the proposed viaduct is constructed principally for the convenience and accommodation of the local com-



munity, applies more or less to the construction of any railroad crossing, wherever made. That this particular crossing is built chiefly for the benefit of the City of Wilkes-Barre, does not exempt the railroad companies from their share of responsibility in making the improvement. Railroad crossings are primarily constructed for the protection and safety of the people who have occasion to use them, and only incidentally for the advantage of the railroads. This is particularly true when the matter relates to an overhead or an undergrade crossing.

In the case before us as shown by the record, there are two communities in the same municipality of respectively five thousand and ten thousand people, separated by six tracks of railroad, and connected with each other by only two streets which are lying over one mile apart. In the order of things, new streets will be opened between these sections for the accommodation of the people living there, and when an overhead crossing like the proposed viaduct is constructed, it will be a benefit not only to the local community, but also physically and commercially, an advantage to the railroad companies concerned in the matter.

In view of the foregoing facts, and after a full and careful consideration of the merits of the case, the Commission has reached the conclusion that the application of the City of Wilkes-Barre ought to be approved and a Certificate of Public Convenience ought to be issued, and that the City of Wilkes-Barre proceed with the work and complete it in accordance with the revised plans and specification.

A clause in Section 12, Article V, of the Act of July 26, 1913, provides that "The Commission shall have exclusive power to determine, order and prescribe, in accordance with plans and specifications to be approved by it, the just and reasonable manner, including the particular point of crossing \* \* \* \* \* in which any public highway may be constructed across the tracks or other facilities of any railroad corporation or street railway corporation at grade, or above or below grade."

In another paragraph of the same section it is provided that "the expense of the said construction \* \* \* \* \* of any such crossing, shall be borne and paid, as hereinafter provided, by the public service company or companies or municipal corporations concerned, or by the Commonwealth, either severally or in such pro-

portions as the Commission may, after due notice and hearing, in due course, determine, unless the said proportions are mutually agreed upon and paid by these interested as aforesaid."

The parties to this proceeding, as shown by the record, have been unable to agree upon the respective proportions of the expense each should pay. The Commission gave to them due notice and held three hearings, giving to each and all of them the fullest opportunity to present whatever facts they believed might be of importance to their respective interests. It therefore, becomes the duty of the Commission, under the statute, to determine the question of expense.

It is the opinion of the Commission that the expenses consisting of the cost of construction, and all other necessary expenses, if there be any, ought to be borne and paid in the following proportions, to wit:

Forty (40) per cent. to be paid by the City of Wilkes-Barre.

Twenty-five (25) per cent. to be paid by the Lehigh Valley R. R. Co.

Seventeen and a-half ( $17\frac{1}{2}$ ) per cent. to be paid by the Delaware and Hudson Company.

Seventeen and a-half ( $17\frac{1}{2}$ ) per cent. to be paid by the Central Railroad Company of New Jersey.

The Commission will expect the City of Wilkes-Barre to exercise reasonable care and diligence in seeing to it that the contract for the construction of the aforesaid viaduct will be awarded to the lowest responsible bidder.

#### ORDER.

This case being at issue, upon petition and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, the Public Service Commission of the Commonwealth of Pennsylvania on this 23d day of October, 1914, hereby finds and determines that the approval of the petition for the location and the construction by the City of Wilkes-Barre of a viaduct from Pennsylvania avenue to Kidder street, in said city, across the tracks and facilities of the Lehigh Valley Railroad Company, the Delaware and Hudson Company and The Central Railroad Company of New Jersey, is proper for the service, accommodation, convenience or safety of the public, and the said Commission

hereby approves the location and the construction of said viaduct by the City of Wilkes-Barre, in accordance with the amended plans and specifications filed by said city and now on file in this office and so marked by the chief of the Bureau of Engineering, and apportions the amount agreed to be paid by the City of Wilkes-Barre to the lowest responsible bidder, according to law, for the construction of said viaduct in accordance with said amended plans and specifications, in the following manner:

Forty (40) per cent. of said amount to be paid by the City of Wilkes-Barre.

Twenty-five (25) per cent. of said amount to be paid by the Lehigh Valley Railroad Company.

Seventeen and one-half ( $17\frac{1}{2}$ ) per cent. to be paid by the Delaware and Hudson Company.

Seventeen and one-half ( $17\frac{1}{2}$ ) per cent. to be paid by the Central Railroad Company of New Jersey.

The Public Service Commission of the Commonwealth of Pennsylvania hereby directs that a Certificate of Public Convenience issue in accordance with the terms of this order.

By the Commission:

FRANK M. WALLACE, *Acting Chairman.*

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ADMINISTRATIVE RULING, NO. 5.

(Superseding Conference Ruling No. 1.)

*In the matter of requiring published rates and fares to continue in effect for thirty days.*

The Public Service Company law, approved July 26, 1913, Article 2, Section 1, (f) provides in part as follows:

"To make no change in any tariff or schedule, which shall have been filed or published or posted by any public service company in compliance with the preceding sections except after thirty days' notice to the Commission and to the public, posted and published in the manner, form and places required with respect to the original tariffs or schedules, which shall plainly state the exact changes proposed to be made in the tariffs or schedules *then in force*, and whether an increase or decrease, and the time when the proposed changes will go into effect;" \* \* \*

The term "then in force" as employed in the paragraph above

quoted must be interpreted as requiring that a tariff or schedule filed and posted must be allowed to become effective and remain in effect for at least thirty days before any change may be made therein, unless specific authority be granted by the Commission, but this will not affect tariffs or schedules containing rates for excursions limited to certain designated periods under authority of General Order No. 4, of 21st day of January, 1914.

Issued by Order of the Commission:

A. B. MILLAR, *Secretary*.

Harrisburg, Pa., September 2, 1914.

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## COUNTY COURT OPINIONS

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CONSUMERS' ELECTRIC COMPANY OF THE CITY OF PITTSBURGH, APPELLANT, *v.* THE PUBLIC SERVICE COMMISSION, RESPONDENT, AND THE CITIZENS' ILLUMINATING COMPANY, INTERVENER.

*Appeal from Public Service Commission—Time for filing of—Notice of filing of finding and determination—Rules of Practice and Procedure, Rule 12—Act of July 26, 1913, Article VI, Sections 1, 14 and 17.*

After a hearing held, the Public Service Commission filed its finding and determination on July 21, 1914, notice of which was given the appellant by registered mail on Sept. 2, 1914. Appellant took its appeal within 30 days after the receipt of said notice. The intervener asks that the appeal be stricken off, on the ground that notice to appellant of the filing of the finding and determination was not necessary, and the appeal should have been taken within 30 days after the filing of said determination.

*Held:* The appeal was taken within the proper time. The Commission, by its Rules of Practice, has interpreted the act as requiring notice of findings and determinations, as well as of orders. Such an interpretation is not forbidden by the act, is not inconsistent with it, and is quite in harmony with Article VI, Section 14, P. L. 1913 (p. 1424).

Rule on intervener's petition to strike off appeal. C. P. Dauphin Co., No. 168, Commonwealth Docket, 1914.

*Frederick W. Fleitz and Ralph J. Baker*, for intervener and rule.

*R. W. Archbald and W. L. Pace*, for appellant, contra.

*Wm. N. Trinkle and Berne H. Evans*, for the Commission.

McCARRELL, J., Dec. 9, 1914.

The pending rule was granted upon the application of the intervener alleging that the appeal had not been taken within the time required by law. It is conceded that notice of the finding and determination of the Commission was given to the defendant by registered mail on September 2, 1914, and that the appeal was taken within thirty days thereafter. The intervener contends that the appeal should have been taken within thirty days from July 21, 1914, the date of the finding and determination by the Commission, and that notice of this finding and determination to the appellant was not necessary.

Article VI, Section 17, P. L. 1913 (pp. 1424-25) provides that:

"Within thirty days after the filing of any finding or determination by the commission, or after the date of service of any order, —unless an application for a rehearing may be pending, and then within thirty days after the refusal of such application,—or the entry of an order modifying, amending, rescinding, or affirming the original finding, determination, or order, any party to the proceedings affected thereby may appeal therefrom to the Court of Common Pleas of Dauphin County."

Article VI, Section 13, P. L. 1913 (p. 1424) provides as follows:

"Every final order of the commission shall be served, in any county of the Commonwealth, upon each public service company affected thereby, either by the marshal of the commission or by an adult person who may be deputized by said marshal for that purpose, in the manner now provided by law for serving a writ of summons upon individuals or corporations; and return of said service shall be made by the person serving said order to the secretary of the commission, in the manner and form now provided by law for making return of the service of a writ of summons; and a certified copy of said order shall be mailed by registered mail to all other parties to the proceedings in which such order is issued, or their respective attorneys".

Article VI, Section 14, P. L. 1913 (p. 1424), provides that:

"After any finding, determination, or order shall have been made by the commission, any public service company or municipal corporation affected thereby, or any party complainant in the proceedings, or any person, corporation, or public service company,

or association duly permitted by the commission, on proper petition and cause shown, to intervene, may apply, within fifteen days after the service of said order, for a rehearing in respect to any matter determined by the commission in or by its hearing or investigation and order issued therein; and the commission may grant and hold such rehearing, if in its judgment sufficient cause therefor be shown".

Article VI, Section 1, P. L. 1913 (p. 1420) regulates the practice and procedure before the Commission and provides that:

"All hearings before the commission or before any commissioner, shall be public; and all hearings, investigations, and proceedings by the commission shall be governed by such rules, not inconsistent with the act, as shall be adopted and prescribed by the commission".

On December 2, 1913, the Public Service Commission adopted its rules of practice and procedure, which will be found in 1 Penn'a Corporation Reporter, pp. 21-44. By rule 12 (p. 26) it is provided as follows:

"After hearing by the Commission, a written finding, determination or order shall be made by it, either dismissing the complaint or directing the public service company or companies complained of to satisfy the cause of complaint, in the manner specified by the Commission and authorized by law. The Commission shall likewise make and file a written finding, determination or order in all hearings or investigations instituted on its own motion. Such final determination or order shall be filed of record by the Commission and a copy thereof served on the parties entitled thereto, as required by law."

We have carefully considered the excellent brief submitted by counsel for the pending rule, and have examined the several sections of the Public Service Commission Act, in which the words "finding, determination or order" are used. The argument in support of the proposition that no notice of a finding or determination is legally required is plausible but not entirely convincing. The Public Service Commission by its rules of practice and procedure has interpreted the act as requiring notice of findings and determinations, as well as of orders. Such interpretation is not forbidden by the act, and does not appear to be inconsistent therewith. Indeed it is in entire harmony with Article VI, Section 14,

which, by necessary implication, required such notice. These rules, by the express language of Article VI, Section 1 (*supra*) are to govern all hearings, investigations and proceedings by the Commission. These rules distinctly provide for service of notice of findings, determinations or orders, and such service appears to have been made in the present case by registered mail, as permitted by law. The appellant, acting upon the faith of the rules of practice and procedure, took its appeal within the statutory period after the date of such service. We are of opinion that the appeal was taken in time and the pending rule to strike off the appeal is now dismissed at the costs of the intervenor.

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IN RE INCORPORATION OF FEDERAL LIFE ASSOCIATION.

*Incorporation of beneficial association—Purposes of—Insurance—Jurisdiction of court—Act of April 6, 1893, P. L. 10.*

1. An application for charter, apparently intended to be drawn under the Act of April 6, 1893, P. L. 10, must be refused where it recites the title of the said act omitting the word "secret," and does not set forth that the organization is to be a secret beneficial society, order or association.

2. "To furnish insurance protection," is a purpose too broad to permit of incorporation under the Act of April 6, 1893, P. L. 10. If the purpose is the creation of a life insurance company or association, then the court has no jurisdiction to grant a charter. The association thereby becomes a corporation of the second class, and should present its application to the governor.

3. Where the title of a proposed beneficial association, such as "Federal Life Association," is such as to mislead the public into the belief that it is dealing with a regular life insurance company, a charter will be refused.

On application for charter. C. P. Luzerne County. No. 948, Oct. Term, 1914.

STRAUSS, J., August 14, 1914.

We must refuse this application for a charter for the following reasons:

First. The Articles of Association presented to the court were apparently intended to be drawn under the provisions of the Act of April 6, 1893, P. L. 10, entitled "An act regulating the organization and incorporation of secret fraternal beneficial societies, orders and associations, and protecting the rights of members therein," and which provides for the incorporation of organiza-

tions where fifteen or more persons, citizens and residents of the Commonwealth, have associated themselves as a secret, fraternal, beneficial society, order or association. This application assuming to recite the title of the act leaves out the word "secret," and when stating that the petitioners have associated themselves together, also leaves out the word "secret," but asserts that they have "associated themselves for the purpose hereinafter specified," and nowhere does it appear that the organization is to be a secret beneficial society, order or association.

Second. The powers of an association authorized by the statute are to be according to Section 1, clause 7; to provide in the constitution and general laws for the payment to its members of all sick, disability or death claims in such amounts as may be authorized and directed by said constitution and general laws; and also to provide for the payment in not less than five years to members whose beneficiary or distribution period may then expire, of such sum, not exceeding the maximum amount named in the beneficiary's certificate, as the constitution and general laws in force at the expiration of said period may authorize and direct.

The purpose of this particular association is stated in the application as follows: The formation of a fraternal, beneficial society, whose members shall include all acceptable persons of proper age and of good moral character, without reference to faith or creed, for beneficial and protective purposes, by providing for the payment unto its members, in case of sickness or disability, and to their beneficiaries in case of death, of such amounts as may be authorized and directed by its constitution and general laws, and to furnish insurance protection and benefits upon the lives of such of its members as may be entitled thereto under the constitution, laws, rules and regulations of the association, and to provide surrender values of its contracts or certificates to its members surrendering the same, and also to accumulate, maintain, apply or disburse among its members an emergency, reserve or other fund as may be provided in its constitution, laws, rules and regulations.

Nothing in the statute authorizes such organizations to furnish insurance protection and benefits upon the lives of such of its members as may be entitled thereto under the constitution, laws.



rules and regulations of the association. Insurance protection is a phrase altogether too broad to harmonize this charter with the statutes of the State. If the purpose is the creation of a life insurance company or association, then this court has no jurisdiction to grant the charter, as the association thereby becomes a corporation of the second class for the insurance of human beings against death, sickness or personal injury, and should present its application to the governor, in accordance with the Acts of April 29, 1874, Section 3, 1 Purd. Dig. 778, pl. 12.

Third. The title of this association, "Federal Life Association," is bound to mislead the public into the belief that it is dealing with a regular life insurance company. While there is nothing in the Act of April 6, 1893, *supra*, expressly regulating the names by which secret beneficial societies may be incorporated, it is clear enough that the court should not permit them to be incorporated under names that will mislead the public and that may give credit to the corporation to which it is not entitled.

Fourth. The person named as president of this corporation is a resident of Scranton but happens to bear the same name as one of the best and most favorably known capitalists in Luzerne county. This circumstance is also likely to mislead persons who might seek insurance protection with this life association because of confidence placed in the financial and moral strength of the name of the man at the head under a mistaken impression as to his identity. We recognize that this reason alone may not legally prevent the granting of the charter, but taken with the other circumstances, and especially with the misleading name of this corporation, it furnishes an important consideration and commands us to refuse this charter, so that it may not at any time hereafter fall into the hands of persons who might unconscionably solicit insurance under an implication of representations that would be false as to the character of the corporation and the personnel of its officials.

Now, August 14, 1914, the application for the incorporation of the Federal Life Association is refused.

SOCIETY OF ST. MICHAEL THE ARCHANGEL v. PETER BELINSKI,  
ET AL.

*Beneficial associations—Factional dispute—Control by minority—  
Forfeiture of membership—Burden of proof.*

Where a factional dispute arose within a beneficial society with regard to a collateral matter not concerned with the conduct of the society itself, and where both factions had elected officers, and had continued to pay dues and distribute benefits, etc., and where the minority officers held the corporate seal, etc., of the society.

*Held:* 1. The burden of showing that the majority were no longer members of the society, is upon the minority.

2. This burden not having been met, the minority must surrender the corporate property and be enjoined from transacting business in the name of the society.

In Equity. C. P. Lackawanna County. No. 2, May Term, 1914.

*A. S. Prokopovitch and Clarence Balentine*, for plaintiff.

*J. J. Powell*, for defendants.

NEWCOMB, J., October 19, 1914.

The specific relief asked for is the surrender of the corporate seal and flag of the society, and that defendants be restrained from conducting business in its name.

From the pleadings, evidence and argument of counsel I find the following:

FACTS.

1. The plaintiff is a Pennsylvania corporation of the first class having been duly incorporated in 1890 in this county where its charter is recorded in the proper office in Charter Book No. 2, page 454. Its corporate purpose is to provide a fund from membership fees and dues for the relief of members in case of sickness or other disability, and for funeral expenses in case of death.

2. It has no formal by-laws; but there is no dispute that from the start it has kept up its organization and has been an active beneficial society carrying out its corporate purpose. The only matter in dispute is as to which of two factions now lawfully represents it.

3. Over a collateral matter the membership became divided in 1913. The large majority has adhered to the group now prosecuting the suit. Admittedly this faction has upwards of 80, while the other has not to exceed 40 members. Three of those named in the bill as defendants are among those who adhere to the majority. They are Wasil and John Kulik and Steve Mislisky.

4. The dissension grew out of the relation between the society and another organization known as The Russian Mutual Aid Association. This pays death benefits varying from \$250.00 to \$1,000.00 according to classification, being in the nature of life insurance, and it is therefore under the supervision of that department of the State government. While it was of much more recent origin than the plaintiff society, it seems to have acquired some degree of influence over its internal management; so much so that it came to regard itself as "the parent society."

5. The fact seems to be that it utilized the society both as a tributary and a collection agent. Its form of insurance was placed among the membership for which the cost was paid through the society in periodical assessments. For this purpose it designated the latter as No. 29, and an accounting was had with it each month.

6. Still later another death benefit organization of like character sprang up and many of the plaintiff's members became insured in that. Their assessments were collected and paid in the same way upon the like monthly accounting. That is called the Russian Brotherhood.

7. As might have been foreseen, the result was rivalry and factional discord about the funds. Eventually a special meeting took up the question in the summer of 1913. This was not presided over by any officer or other member of the society, but by the secretary of The Mutual Aid, who seems to be its general factotum. The outcome was the adoption of a measure advocated by him for the division of the money in plaintiff's treasury, less the amount of accrued benefit, claims and other liabilities, between the two factions. This was consummated by an instrument in writing dated December 19, 1913, which appears in the transcript as Exhibit A. It is too lengthy to be set forth here.

8. The defendant Belinski being then president, the existing organization remained undisputed until the next annual election

which occurred the first of January, this year. He and his associate officers were then re-elected by the minority, while another set of officers with Wasil Hubiak as president, were elected by the majority. Since then there have been two organizations. Belinski as head of the defendant faction has retained possession of the common seal and the flag of the society. Just what business, if any, his faction has done does not appear, except that a few persons may have been admitted to its membership in the meantime. The majority have continued to pay dues, &c., and through their organization to distribute relief as provided by their charter and regulations. They are in possession of the minutes and all other records of the society.

9. The sole defense to the bill is the claim that in connection with the proceedings to divide the funds, the majority withdrew from and renounced their membership.

The parties have submitted requests for certain specific findings of fact. Those of plaintiff are fully covered by the foregoing and need not be further answered. The same is in part true of those of defendants. The balance are disposed of as follows:

4. That Peter Belinski, president, and Vico Hubiac, secretary of the said society represented the St. Michael Archangel Society at the time when the said agreement, plaintiff's Exhibit "A," was signed, and that in executing the said agreement they represented the Society of St. Michael Archangel.

Answer. It is not so found. They may have represented one faction of the society.

5. That at the time the said agreement was signed, Wasko Gambol and Wasil Hubiac represented the faction known as the Brotherhood of Love and they executed the agreement as representing a portion of the society.

Answer. It is so found only in the sense that they represented the faction insured in the Brotherhood.

7. That at the regular meeting of the said society, held on the first day of January, A. D. 1914, Peter Belinski was again elected president of the said society and Vico Hubiac secretary, and Daniel Joscok, treasurer.

Answer. It is not so found. They were irregularly chosen by a minority faction.

8. That at all times the defendants, through their officers, have

been exercising the corporate powers of the Society of St. Michael Archangel and have been exercising the same as the St. Michael Archangel Society.

Answer. It is not so found. They have maintained the form of an organization, but they could not exercise the corporate powers as they were not invested with them.

9. That the plaintiffs in the said bill have failed to attend any of the meetings of the said society since January, 1914, and have been contributing nothing towards the funds of the society since that time.

Answer. It is not so found.

10. That by the agreement entered into between the Society of St. Michael Archangel, represented by Peter Belinski and others, and by the Brotherhood of Love, represented by Wasko Gambol and others, the said Brotherhood of Love decided to become a new organization and they withdrew from the organization of St. Michael Archangel and are now known as the Brotherhood of Love.

Answer. It is not so found.

11. That the respondents are entitled to exercise the corporate powers of St. Michael Archangel Society and are entitled to retain possession of the charter, flag and seal of the said organization.

Answer. This asks for a legal conclusion and as such is refused.

The facts give rise to the following

#### CONCLUSIONS OF LAW.

1. The nature of the single question at issue casts upon defendants the burden of affirmative proof that the majority, now claiming to represent the corporate body, have ceased to be members.

2. Whatever else might be said of it, the action taken in December, 1913, had no such significance; and there is no evidence to warrant such conclusion.

3. It follows that the issue is with plaintiff and the majority faction. Belinski and those who have associated themselves with his defense are jointly subject to the exigencies of the decree to be made.

4. While they have not been dropped by amendment, the three heretofore mentioned, namely, Vasil Kulik, John Kulik and Steve Mislisky, appear to have been improperly joined.

5. As against all the others plaintiff is entitled to relief and decree should be entered to enjoin them and each of them, (1), against holding any meeting or doing any act in the name of the society or ostensibly on its behalf; (2), upon demand made by Wasil Kubiak, its president, or by his successor in office, to surrender and deliver over the common seal and the flag mentioned in the bill.

6. Defendants should pay the costs.

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HIESTER, ET AL., v. GOUGLERSVILLE BAND, ET AL.

*Corporations not for profit—Rights of majority and minority—  
Place of business—Change of name—Bill to restrain.*

1. Unless unlawful, or forbidden by fundamental articles, the will of the majority of members of a corporation must govern.

2. Where it is otherwise, the minority may appeal to the court for protection.

3. Where a place of business is designated by a corporation, it does not follow that all the lawful business of the corporation must be confined to that place.

4. The purchase of real estate within the county, by a corporation of the first class, for carrying out its corporate purposes, is not unlawful nor ultra vires, and such purchase will not be restrained unless it be shown to be for an unlawful purpose.

5. Taking steps toward a change of name and of location of a corporation, by amendment of the charter, is not unlawful, and a bill to restrain must be dismissed, without prejudice, however, to the right of the minority to appeal to the court if these ends are obtained in any other than a legal manner.

C. P. Berks Co. In Equity. No. 1118 Equity Docket, 1914.

*Joseph R. Dickinson*, for plaintiffs.

*William Rick*, for defendants.

ENDLICH, P. J., October 24, 1914.

I. FINDING OF FACTS.

1. The plaintiffs are members of the Gougliersville Band, defendant, a corporation erected by decree of the Court of Common Pleas of this county, of February 14, 1911, its charter, recorded in the office of the recorder of deeds, etc., of said county, in Charter Book, Vol. 6, p. 681, declaring the purpose of the corporation to

be "the promotion, cultivation and practice of the art of music by its members," and designating "the town of Gouglersville, Cumru Township, Berks County, Pennsylvania," as "the place where the business of said corporation is to be transacted."

2. The defendants, Griffith, Artz and Fultz, are respectively the president, secretary and treasurer of said corporation.

3. Since its incorporation the Gouglersville Band has maintained a band in Gouglersville and transacted its business in a hall, there hired for the purpose, using the same as a band-room for practice and rehearsals, the storing of its instruments and paraphernalia, and the holding of its business meetings.

4. At a corporate meeting held at said hall on November 28, 1913, a resolution was passed by a vote of 11 to 3, to purchase an auditorium in the Borough of Mohnton, some 3 miles distant from Gouglersville, the intention being to transfer the location of the band from Gouglersville to Mohnton. Against this, and the appropriation and expenditures of corporate funds for this purpose, plaintiffs and others protested at the time and subsequently as unlawful under the charter.

5. Notwithstanding said protest a majority of the directors or trustees of the corporation, in pursuance of said resolution, entered into an agreement for the purchase of the Mohnton auditorium for \$4,200 and paid \$500 upon it.

6. On January 23, 1914, at a meeting of the band at the Gouglersville hall a resolution was adopted by a vote of 14 to 7, looking towards a change of the name of the "Gouglersville" to the "Marine" Band and of its location and place of business from Gouglersville to Mohnton by legal proceedings amending the charter and by alteration of the by-laws accordingly.

## II. DISCUSSION.

The plaintiffs in this case, suing for themselves and others who may join them, seek a decree restraining the corporation and the majority of its membership from consummating, and from expending corporate funds in the consummation of, the purchase of the Mohnton auditorium, and compelling restitution to the corporate treasury of the sum already laid out in that behalf. The proposition involved in their bill is that under the charter, as it stands, the location of the corporation is Gouglersville; that there its business is bound to be transacted; that a transfer of the loca-

tion to Mohnton and a change of name incidental thereto would be in violation of the charter; that every act or expenditure having such a transfer and change in view must necessarily be unlawful; and that, therefore, the acquisition of the Mohnton auditorium, having them in view, is unlawful and every expenditure of corporate funds connected therewith a misappropriation of those funds. The rule is that, unless the fundamental articles provide otherwise, the will of the majority of the membership of a corporation must govern: *McKean v. Biddle, et al.*, 181 Pa. 361. This rule, however, refers to lawful action. As against unlawful acts of the majority, the minority, unable to protect itself, is entitled to the protection of the courts: *Schmid v. Theatre Co.*, 244 id. 373. But what unlawful action is here threatened or attempted by the majority, to forbid which this court may justly interpose? No doubt, the name of a corporation is an essential in its corporate existence: *B. & L. Ass'n v. B. & L. Ass'n*, 159 Pa. 308, 311, to be altered only by amendment of its charter: *ibid.*; *Pet'n of Liberty Bell Lodge*, 231 Pa. 112. Let it be granted also that the "business" of the corporation, which under its charter is to be transacted at a designated place, means more than what in *Derry Council v. State Council*, 197 Pa. 413, 416, is referred to as its "strictly corporate acts," such as corporate meetings and the like; that it ought to be understood as comprehending the principal business operations carried on by it: *Transport Co. v. Detroit*, (Mich.) 51 N. W. 978, 980; and that its location can, like the name, be changed only by an amendment of the charter. Yet it does not follow that all of the business the corporation may lawfully engage in must be confined to the place designated and carried on just there. The contrary acceptance is too familiar in everyday practical experience to call for vindication. Neither does it follow that where a change of name and location are desired by a majority of the members, and proceedings for the amendment of the charter permitting them are in contemplation, every act previously done in view of such change, but not itself necessarily involving it, must be unlawful. Under Rule XXVII, Section 5, of the rules of this court, we are at liberty to take judicial notice of the recorded charter of the defendant corporation: See *Brotherhood v. Becker*, C. P. Berks Co., No. 27, Aug. T., 1894; *Orth v. Rainbow, etc., Co.*, No. 45, June T., 1907.



Whilst the business of the corporation is to be transacted at Goughersville, there appears to be nothing in its nature or in the terms descriptive of it forbidding the corporation to own, or to employ its funds in the purchase of, real estate in a neighboring community withing the county, when that property is of a kind indicative of its appropriateness to the purposes for which the corporation was erected. The acquisition of such property seems directly authorized by the general power given by the Act of 1874 to corporations formed under it to take and hold real estate. The rule being that there can be no injunction against that which the statute declares lawful: *Gaw v. R. R. Co.*, 196 Pa. 442, 451, the only possible ground upon which the purchase by the corporation, here complained of, could be asked to be interfered with would, therefore, be that an otherwise lawful act was rendered unlawful by the alleged unlawful intent which is claimed to have prompted it and which, it is said, it is meant to serve,—namely the change of name and location. It must be remembered, however, that this change may be lawfully sought by proceedings to amend the charter. It could be unlawful only if done without such authority and in defiance of the existing charter provisions. A purpose so to accomplish it cannot, of course, be presumed, and as for any proof of it, there is none whatever. It appears on the contrary that the intention is to apply for a change of name, etc., in the proper and legal way; and though the formal declaration of this intention came after the filing of plaintiff's bill, it was entirely consistent with what had been done before, no contrary intention having been previously evinced. In equity the situation at the time of the decree, not at the commencement of the suit, is the criterion: *Shaw v. Bayard*, 4 Pa. 257, 258-9; *U. S. Brick Co. v. Brick Co.*, 228 id. 81, 88. Now, it was pointed out in *Deysher v. Reading*, 17 Pa. C. C. Rep. 611, and again in *Tomlinson v. Reading*, C. P. Berks Co., No. 922 Eq. Dock. 1906, and *Academy v. Mishler*, No. 933 Eq. Dock. 1907, that it is only that which it is proposed to do that can be enjoined, not something which it is not proposed to do. Nor is a mere apprehension that that which it is proposed to do in a lawful, may be attempted in an unlawful, way a sufficient basis for equitable interposition. See *Rhodes v. Dunbar*, 57 Pa. 274, 288.

It follows with a pretty high degree of certainty that, as this

case now stands, the plaintiffs are not entitled to the relief they pray for, and that their bill should be dismissed. They will have an opportunity of being heard in opposition to any change of name or location when an application for the amendment of the charter in those particulars is made; and it may be added that, should these changes be undertaken without such previous authority, the way will be still open to plaintiffs to ask for appropriate action by the court.

There seems to be no good reason why the disposition of the costs of this litigation should not follow the ordinary rule in equity, which imposes them on the losing party.

### III. CONCLUSIONS.

A. The action of the defendants, in accordance with the direction given by a majority of the members of the Gouglersville Band at the corporate meeting of November 28, 1913, in entering into an agreement for the purchase of an auditorium in Mohnton, and in paying \$500 out of the corporate treasury upon said agreement, cannot be declared unlawful in itself, or by reason of a purpose then entertained looking towards a change in the name and location of the corporation as designated by the charter.

B. As affecting the lawfulness of said purchase, there was nothing unlawful in the purpose entertained to change the name and location of the corporation, unless that change was intended to be accomplished otherwise than by the regular and lawful method of seeking an amendment of the charter in these particulars; and there is no proof in the case of the existence of such intention.

C. The plaintiffs' bill is to be dismissed, with costs, but without prejudice to the right of plaintiffs and other members of the corporation, joining with them, to resist any application that shall be made for amendment of the charter, or to apply again for the interposition of this court in the event of an attempt by defendants to change the name and location, or either, of the corporation without previous amendment of the charter.

And now, October 24, 1914, the prothonotary is directed to enter a decree nisi in accordance with the foregoing decision, and forthwith to give notice thereof to the parties or their counsel of record, sec. reg.

JEFFERIS, ET AL., v. PITTSBURGH LIVE STOCK EXCHANGE, ET AL.

*Corporation not for profit—By-laws—Reasonableness of—Rights of citizens of other states—Federal Constitution Article IV, Section 2.*

The Pittsburgh Live Stock Exchange is a corporation not for profit organized for the purpose of promoting the interests of its members and of regulating the conduct of business between them. Its place of business is at the Pittsburgh Union Stock Yards. Its charter does not require members or employees to be residents of Allegheny County. In April, 1913, it passed a by-law providing that "a fine of \$100 shall be imposed upon any firm or member of this exchange doing commission business at the Pittsburgh Union Stock Yards, who shall employ or allow anyone who is not a resident of Allegheny County, to sell stock other than his own and bill in his own name, on this market."

For many years a partnership, of which plaintiffs are members, had been a member of the exchange. On Jan. 1, 1914, A., a resident of Ohio, became a member of the partnership, and afterwards sold cattle at the stock yards for the firm. The exchange notified the partnership that it had violated the above by-law, and, after hearing, a fine of \$100 was imposed. This was paid by the appropriation of a deposit which the firm had with the exchange, and the firm was suspended from membership until another \$100 had been deposited.

Plaintiffs ask that the said by-law be declared void, that the fine be remitted and that the preliminary injunction restraining the enforcement of the by-law be made perpetual.

*Held:* 1. The by-law is unreasonable, void and violative of individual rights. It is in conflict with Article IV, Section 2, cl. 1 of the Federal Constitution—"The citizens of each state shall be entitled to the privileges and immunities of citizens of the several states."

2. The by-law applied only to employees and not to a member of the firm.

3. The fine shall be repaid and the injunction made perpetual.

In Equity. No. 450 July Term, 1914. C. P. Allegheny County.

*Prestly & Nesbit and John C. Bane, for plaintiffs.*

*R. R. Elder, for defendants.*

SWEARINGEN, J., November 11, 1914.

This bill was filed by a partnership, doing business as J. B. Huff & Company, against the Pittsburgh Live Stock Exchange, a corporation of the first class, wherein it is alleged that it had il-

legally fined the complainant and had illegally suspended the complainant from membership in said corporation, and that it intended to take further unlawful proceedings against the complainant; and the prayers were that the defendants be enjoined from entertaining further charges against the complainant, under the alleged illegal by-law, that said by-law be decreed void and not enforceable and that the fine already imposed and paid be ordered refunded.

Upon application, a preliminary injunction was granted, which, at the hearing thereon, was continued until final hearing.

The defendant answered the bill, in which it denied that the by-law of which complaint was made was illegal, denied that the action taken was unlawful, and denied that any illegal proceedings against the complainant were contemplated.

A replication was filed and the cause came on for trial in due course. From the evidence we find the following

#### FINDINGS OF FACT.

1. The complainants, Samuel W. Jefferis, Albert N. Greenlee and Howard W. Strayer, were and have been since January 1, 1914, co-partners, trading under the firm name of J. B. Huff & Company, which is conducting the business of buying and selling upon commission cattle, sheep, hogs and calves at the Union Stock Yards, Pittsburgh, Pennsylvania. All its business is done upon commission. Its business was, at the time of the occurrences of which complaint is made, a profitable one.

2. The Pittsburgh Live Stock Exchange, one of the defendants, is a corporation of the first class, created and existing under the laws of Pennsylvania. It was organized "for the purpose of fostering the general business interests of all its members, and the regulation of business among its members and with customers." Its charter was granted by the Court of Common Pleas No. 2 of Allegheny County, Pennsylvania, on January 27, 1896, at No. — January Term, 1896. The other defendants are officers and directors. Ira F. Brainard is president; W. J. McMannis is vice-president; T. T. Lowman is secretary; W. A. Merritt is treasurer; and V. N. Cooper, J. T. Doyle, J. Needy, C. W. Reynolds and C. W. Laurer are the directors; and these defendants were the officers and directors of said corporation at the time of the occurrences of which complaint is herein made. The application

of the incorporators of the corporation, and the rules and by-laws providing for the government and management of the corporation, together composing its Articles of Association and Charter, are recorded in the recorder's office of Allegheny County, Pennsylvania, in Charter Book Volume 22, page 126. The principal place of business of said corporation is in the City of Pittsburgh, Pennsylvania, at the Pittsburgh Union Stockyards.

3. For a number of years prior to January 1, 1914, J. B. Huff & Company was composed of Samuel W. Jefferis and Albert N. Greenlee, and it was a member of the Pittsburgh Live Stock Exchange. For about twelve years the firm had in its employ, as a cattle salesman, Howard W. Strayer, who resided at Scio, State of Ohio; and he still resides there. During his employment with J. B. Huff & Company and since he became a member thereof he has never done anything injurious or prejudicial to the Pittsburgh Live Stock Exchange or any of the members thereof. On January 1, 1914, he was admitted as a full partner in the firm of J. B. Huff & Company aforesaid. His admission as a member of the firm had been in contemplation for a long time prior thereto. Since he became a member of said firm, he has received no salary, but he has shared in the profits and borne the losses, the same as the other two partners. J. B. Huff & Company constitute a membership in the Pittsburgh Live Stock Exchange, in accordance with the rules and by-laws thereof, each of the members of said firm, to wit, Samuel W. Jefferis, Albert N. Greenlee and Howard W. Strayer, having prior to January 5, 1914, signed the rules, regulations and by-laws thereof as evidence of their good faith; and each of them is thereby a member of said corporation.

4. Among the rules and by-laws of the Pittsburgh Live Stock Exchange are the following:

"Section 3. Every member shall receive a certificate of membership bearing the corporation seal of the exchange, and the signatures of the president and secretary. On and after February 17, 1896, if any member in whose name said certificate stands has paid all assessments due and has against him no outstanding, unadjusted or unsettled claim or contract held by members of the exchange, and said membership is in no way impaired or forfeited, the member may surrender the membership and receive the sum of \$100.00 deposited with the treasurer; provided, however, that he cease to do business at the Pittsburgh Central Stockyards."

"Section 5. Each member of this exchange, or when two or more members constitute a firm, the said firm shall pay to the treasurer of this exchange the said sum of \$100.00, which sum, or so much thereof as the board of directors may order, shall be forfeited to the exchange whenever the person, or firm, or any member of the firm making payment shall have been adjudged guilty of a violation of any rule of the exchange. Any member or firm whose deposit of \$100.00, or any part thereof, has been so adjudged to be forfeited, shall be suspended from membership in this exchange until he or they have made an additional deposit, or such part thereof, as may have been forfeited. All forfeited deposits and interests received upon deposits shall be placed to the credit of what shall be known as the expense fund, and used for defraying the expenses of the exchange."

"RULE XVI.

"Section 4. No member of this exchange shall have any business transactions whatever with parties indebted to other members of this exchange in good standing until such indebtedness has been fully settled.

"Section 5. No party or parties beginning a live stock commission business at Pittsburgh Central Stockyards shall be considered subject to the rules of this exchange until twenty days from the date of their beginning such business, providing further that nothing herein contained shall be construed as in any manner prohibiting any party from selling his own live stock on the market of said stockyards; or any member of this exchange from buying such stock from such owner."

"Supplement to By-Laws, M. P. 35.

"At a special general meeting, December 15, 1897, the following substitute was adopted for Rule IX, Section 6: No member of this exchange shall buy or cause to be bought, sell or cause to be sold, in any manner, any live stock, on the market at the Pittsburgh Central Stockyards on Sunday. On the following holidays, to wit: Decoration Day, Fourth of July, Thanksgiving and Christmas, business in all departments shall commence at 7 a. m., and shall be suspended at 10 a. m., except any of the above-named holidays shall fall upon Monday; then business shall be suspended at 1 p. m."

"M. P. 310, Rule XVI, Section 6: No member of this exchange engaged in the selling or buying of live stock for non-residents on commission, shall pay, agree to pay, or cause to be paid, the cost of transmission of any telephone or telegraph message, either sent or received except as hereinafter provided.

"Members may pay the cost of transmission of a telephone or telegraph message, quoting a bona fide sale of live stock, made the same day the message is sent for the person addressed, and quoting therein the condition of the marker; and also all telephone and telegraph messages pertaining to inquiries instituted by and for the personal information of members, and also all messages pertaining to delayed stock, also messages sent in soliciting orders."

"M. P. 310, Rule IX, Section 5: No member of this exchange shall employ or in any manner pay a traveling or resident live stock solicitor.

"Only active bona fide members of firms or active bona fide salesmen of live stock on this market who are members of this exchange, may be allowed to solicit.

"No commission firm shall have more than one solicitor on the road at the same time.

"Firms desiring to send a solicitor on the road shall notify the secretary of this exchange."

On December 4, 1913, the Pittsburgh Live Stock Exchange sent the following letter to each of its members:

"Gentlemen: We respectfully call your attention to the following rule, adopted by the Pittsburgh Live Stock Exchange, in reference to payment for live stock purchased from commission firms on this market:

" 'RULE XVIII.

" 'Section 1. All live stock bought by non-resident buyers, or shippers, must be paid for the same day stock is purchased.

" 'Section 2. All stock bought by resident buyers must be paid for not later than the second business day following purchase of said stock.

" 'Section 4. Commission firms are required to report to the secretary in writing all delinquents on the following business day on form approved by the board of directors; also report

promptly in same manner the payment of any bills previously reported as delinquent and unpaid. It shall be the duty of the board of directors, in case of delinquents reported after third time to investigate as to financial standing of such delinquents, and make a record of their findings and place said delinquents on the cash list as per Section 1.

"Section 5. It shall be the duty of the board of directors to impose a fine upon each firm violating this rule, as follows: \$100.00 for first offense, \$200.00 for second offense and \$300.00, suspension or expulsion for third offense."

"This rule will be strictly enforced on and after December 15, 1913, and we desire to give you notice in due time so that no inconvenience will be sustained by our patrons. We believe that this rule will prove to be a benefit to both buyers and sellers, and ask your co-operation.

"In other markets buyers pay for the live stock same day as purchased.

Yours respectfully,

Pittsburgh Live Stock Exchange,  
T. T. Lowman, Secretary."

Consequently, all parties who are engaged in the live stock commission business at the Pittsburgh Union Stockyards are members of the Pittsburgh Live Stock Association; and this has been true ever since the organization of the latter corporation.

5. The Pittsburgh Live Stock Exchange, at a meeting of the members thereof, held April 3, 1913, passed an additional rule or by-law, which is as follows:

"A fine of one hundred dollars shall be imposed upon any firm or member of this exchange doing commission business at the Pittsburgh Union Stockyards, who shall employ or allow anyone, who is not a resident of Allegheny County, to sell stock other than his own and bill in his own name, on this market."

6. The said Howard W. Strayer, one of the complainants, sold cattle at the Pittsburgh Union Stockyards, on Monday, January 5, 1914, at that time being a non-resident of Allegheny County, Pennsylvania. He was a regular and bona fide partner, along with Samuel W. Jefferis and Albert N. Greenlee, in the firm of J. B. Huff & Company, engaged in the business, among other things, of selling cattle at the Pittsburgh Union Stockyards. He



was not employed nor allowed by the complainant, J. B. Huff & Company, to sell cattle on said day, but said cattle were sold by him as a member of the co-partnership of J. B. Huff & Company, and as a member of the Pittsburgh Live Stock Exchange, and not while an employee, licensee, or permissible agent of the said J. B. Huff & Company.

7. On January 9, 1914, the complainant, J. B. Huff & Company, received notice that it had violated the additional rule, mentioned in Findings of Fact 5, as follows:

"You are hereby notified that charges have been preferred against you by the Pittsburgh Live Stock Exchange for violation of rule relative to the employment of non-resident salesmen by commission firms, as recorded in Minute Book, No. 2, page 91.

"Specification: Cattle sold by Mr. Howard Strayer, Monday, January 5, 1914.

"You will please be prepared to answer said charges at a hearing before the Board of Directors, Friday, January 16, 1914, at one o'clock, p. m.

Yours respectfully,

T. T. Lowman, Sec'y.

By order Board of Directors."

January 13, 1914, the complainant was notified that said hearing had been postponed until Tuesday, January 20, 1914, at 2 o'clock, p. m.

Thereafter, to wit, on January 20, 1914, the said charges were heard and the complainant partnership was adjudged guilty of violating said rule and a fine of \$100.00 was imposed, as appears by the notice sent, which is as follows:

"Messrs. J. B. Huff & Company, City.

"Gentlemen: You are hereby notified that you have been adjudged guilty of the charges preferred against you in violating rule relative to employment of non-resident salesmen, as recorded in Minute Book No. 2, and that the fine of one hundred (\$100.00) dollars is imposed for infraction of the rule. By order of the Board of Directors.

T. T. Lowman, Sec'y."

8. J. B. Huff & Company, at the time of the imposition of said fine as stated in Findings of Fact 7, had on deposit with the treasurer of the Pittsburgh Live Stock Exchange, in compliance with Rule VIII, Section 5, recited in Findings of Fact 4, the sum of

one hundred dollars, which said sum was immediately applied by the treasurer of the Pittsburgh Live Stock Exchange to the payment of said fine. J. B. Huff & Company was thereupon, under the rules and by-laws aforesaid, in default of the deposit of one hundred dollars required of each member, and it was forthwith, to wit, on January 21, 1914, suspended from membership in said Pittsburgh Live Stock Exchange.

Later in the same day, to-wit, on January 21, 1914, J. B. Huff & Company paid into the Pittsburgh Live Stock Exchange the sum of one hundred dollars, and was reinstated as a member.

9. The defendants, immediately after the suspension of J. B. Huff & Company, gave notice of such suspension to the other members of the Pittsburgh Live Stock Exchange, by reason whereof I. Zeigler & Sons and S. B. Hedges & Company refused to buy live stock from the complainant, and other members of the Pittsburgh Live Stock Exchange refused to deal with the complainant until informed of the reinstatement of the firm by deposit of said sum of one hundred dollars as aforesaid.

10. Between January 5th, 1914, and the date of the granting of the preliminary injunction, hereinafter mentioned, the said Howard W. Strayer made many sales of cattle as a member of the partnership, J. B. Huff & Company, on the market at the Pittsburgh Union Stockyards. On April 25th, 1914, this bill of complaint having been filed, the court, upon motion, granted a preliminary injunction restraining the defendants from hearing or entertaining any charges against the partnership, J. B. Huff & Company, under the by-law referred to in Findings of Fact 5.

Another charge had been lodged with the Board of Directors of the Pittsburgh Live Stock Exchange against the complainants, similar to that described in Findings of Fact 7, but a hearing thereon has not been had solely because of the granting of said preliminary injunction; and said charge is still pending and undetermined.

11. The Pittsburgh Union Stockyards is a concern engaged in business in Pittsburgh, Pennsylvania. It has the facilities for unloading and reloading live stock, the scales for weighing them, the pens for distributing them when unloaded, and provides feed for them. It has no connection with the Pittsburgh Live Stock Exchange. In order to do business at the Pittsburgh Union Stock-

yards, it is not necessary that a party be a member of the Pittsburgh Live Stock Exchange. But such a party can only do business by paying cash, and members of the Pittsburgh Live Stock Exchange are prohibited from doing business with such a party otherwise than for cash.

From the foregoing we arrive at the following

#### CONCLUSIONS OF LAW.

First. There is jurisdiction in equity to determine the controversies pleaded in this record and to grant relief to the complainants for the wrongs which they have alleged.

Second. The so-called rule, adopted by the Pittsburgh Live Stock Exchange, Findings of Fact 5, is a by-law of said corporation, within the meaning of the law. It is not a part of the charter. A charter of a corporation can only be changed in accordance with the provisions of the statutes relative to amendment. Nothing of that kind was attempted in this case. Besides, this by-law relates to the regulation of the internal affairs of the corporation, which brings it within the definition of a by-law. But whether it is a rule or a by-law is not so important, because in either event its reasonableness is a question for the court.

Third. It is an inherent right of the Pittsburgh Live Stock Exchange to adopt by-laws. But they must not be contrary to law, nor violative of the common, inherent rights of individuals. Howard W. Strayer and the other members of the firm, J. B. Huff & Company, had the natural right to form a partnership. And said firm, so constituted, had the natural right to buy and sell cattle upon commission anywhere, so long as the law was observed. In like manner, J. B. Huff & Company had the lawful right to become a member of the Pittsburgh Live Stock Exchange. The firm did so, and by so doing each co-partner became a member of the corporation, entitled to all the rights, privileges and advantages incident to that relation. Membership in the corporation is not restricted to residents of Allegheny County, Pennsylvania. Its charter does not attempt to limit the right of contract, nor does it require employees to be residents of a particular locality. The said by-law, Findings of Fact 5, is therefore illegally discriminatory against Howard W. Strayer and the other members of J. B. Huff & Company, in that it deprives them of the

common right of contract; and this for the sole reason that Howard W. Strayer is a non-resident of Allegheny county, Pennsylvania. For it is admitted, Findings of Fact 3, that he has never done anything detrimental to the interest of the Pittsburgh Live Stock Exchange, or of any of the members thereof. It follows that said by-law is contrary to the Federal Constitution, which provides that:

"The citizens of each state shall be entitled to the privileges and immunities of citizens of the several states." Article IV, Section 2.

Consequently, we are obliged to hold that said by-law is contrary to law, is violative of individual rights and is unreasonable and void.

Fourth. Said Howard W. Strayer was not employed, nor allowed to sell cattle by J. B. Huff & Company on January 5, 1914, within the meaning of the by-law mentioned in Findings of Fact 5. He was at that time a member of the said firm, and his sale of cattle was as a member and not as an employee thereof. Therefore, said by-law does not apply to him and could not be enforced against the firm of J. B. Huff & Company. It follows that the enforcement of said by-law was unlawful.

Fifth. The action of the Pittsburgh Live Stock Exchange in fining J. B. Huff & Company \$100, as stated in Findings of Fact 7, and in collecting the same, was illegal, and a decree should be entered requiring the Pittsburgh Live Stock Exchange to repay the said sum of \$100, with interest from January 21, 1914, to J. B. Huff & Company.

Sixth. The preliminary injunction heretofore issued should be made perpetual.

Seventh. The costs should be paid by the defendants.

Let a decree be drawn in accordance herewith and be presented to the court, as required by the Rules in Equity, unless exceptions be filed within the time prescribed in said rules.

## PUBLIC SERVICE COMMISSION

THE CITY OF PHILADELPHIA, HARRY E. BELLIS, ET AL., V. THE  
PHILADELPHIA & READING RAILWAY COMPANY, ET AL.

*Railroads—Freight rates—Reasonableness of—Discrimination  
between localities—Comparison of rates.*

The complainants alleged that the rates on anthracite coal from the Schuylkill, Lehigh and Wyoming fields to Philadelphia for local delivery were unreasonable and discriminatory.

As the evidence did not show with exactness all the elements entering into the cost of this transportation, nor the value of the investment upon which a return was to be earned, it was necessary to determine the reasonableness of the rates from other evidence.

It appeared that the respondents own or control a large percentage of the unmined anthracite coal in the state and exercise an extended influence over its output and disposition; that the rates complained of had been established for from seventeen to forty years without revision or change; that these rates from the several fields by the several routes varied from \$1.70 to \$2.10 per gross ton for prepared sizes, from \$1.40 to \$1.73 for pea coal, and from \$1.25 to \$1.54 for sizes less than pea; that the cost of transportation over the several routes, including all operating costs but excluding any return upon investment or interest on debt, varied from 44.698 cents to 77.420 cents per ton; that the rates of the Schuylkill Navigation Company, which formerly operated a canal the traffic of which is now absorbed by the respondent railroads, from the Schuylkill coal fields to Philadelphia varied from \$1.00 per ton in 1839 to \$0.36 per ton in 1845, and that this company met its fixed charges and paid substantial dividends; that the rate per ton mile on bituminous coal carried by the Pennsylvania Railroad, the Philadelphia & Reading Railway and other carriers, varied from 2.53 mills to 6.1 mills, and the rate per ton mile on anthracite coal carried by the Philadelphia & Reading Railway varied from 8.599 mills to 9.046 mills; that the rates on anthracite coal shipped to Philadelphia over the roads of the respondents intended for trans-shipment to New York, Boston, and other points "beyond the capes" were 40 cents less per ton than the rates for local delivery which are complained of; and that these rates on coal so trans-shipped were remunerative.

*Held:* (1) The rates have remained the same for over seventeen years, the presumption is against the propriety of continuing these rates. This presumption does not go to the extent of indicating that they ought to be raised or lowered, but only that they ought to be revised and changed so as to meet present conditions.

(2) The respondents are entitled to such rates as will give them a reasonable return upon their necessary investment, but a great city, lying near the fields of anthracite coal, ought not to be burdened with an un-

due share of the cost of transportation because of the fact that it is dependent upon this supply for heat and power and has no other resource for having it transported.

(3) In determining whether or not there has been a discrimination against freight locally delivered, the question of the effect of competition in the through freight, if it exists, is to be given due consideration. But with respect to this particular situation the fact of competition is at least open to query.

(4) If existing rates on all freight do not afford a fair return upon the investment of the respondents, the remedy should be a general advance in such manner as to equalize the burdens and to affect alike all interests and all subjects of traffic. Unequal burdens on certain localities or commodities ought not to be tolerated.

(5) Under all the evidence, the rates on prepared sizes of anthracite coal, and on pea coal should be reduced 40 cents per ton, which reduction will put these rates on an equality with the rates charged for coal destined to points beyond Philadelphia.

#### COMPLAINT DOCKET No. 950.

(Pennsylvania State Railroad Commission.)

Report and Order of the Public Service Commission.

Submitted October 7, 1912.

Decided December 12, 1914.

*Ward W. Pierson and Harold S. Shertz*, for complainants.

*George Stuart Patterson*, for the Pennsylvania Railroad Co.

*Charles Heebner*, for the Phila. & Reading Railway Co.

*Jackson C. Reynolds*, for the Central Railroad Co. of N. J.

*R. W. Barrett*, for the Lehigh Valley Railroad Co.

*A. L. Saeger*, for the Delaware, Lackawanna & Western Railroad Co.

#### COMMISSIONER PENNYPACKER:

This is a case of grave importance, affecting upon the one hand, the cost of the supply of a necessity to the inhabitants of the chief city of the State, and upon the other, the earnings of important lines of transportation which have done much to advance the growth and development of the interests of that city. The complainants are Harry E. Bellis, as an individual, the Kensington

Board of Trade, the Northwest Business Men's Association, the Cobocksink Business Men's Association, the Fortieth and Market Street Business Men's Association, all of them being organizations or persons residing in or associated with the City of Philadelphia, and the City of Philadelphia itself, as a municipality.

The respondents are the Philadelphia and Reading Railway Company, the Pennsylvania Railroad Company, the Central Railroad Company of New Jersey, the Lehigh Valley Railroad Company and the Delaware, Lackawanna and Western Railroad Company.

The substance of the complaints is that the existing rates of freight charged for the transportation of anthracite coal from the various districts in which the coal is mined to the City of Philadelphia are unreasonably high, and are preferential, prejudicial and discriminatory. The anthracite coal deposits of the United States are almost exclusively within the State of Pennsylvania, and are included within a territory comprising four hundred and ninety-six square miles. For purposes of mining and transportation, this territory is divided into three districts, designated as the Schuylkill, Lehigh and Wyoming regions or districts.

(a). The rates upon anthracite coal, which is transported by direct routes from the Schuylkill district to Philadelphia, and consigned for local delivery there, are the same upon both the Pennsylvania Railroad and the Philadelphia and Reading Railway, and are as follows, per gross ton of 2,240 pounds:

For prepared sizes, .....	\$1.70
For pea coal, .....	1.40
For sizes less than pea, .....	1.25

(b). The Philadelphia and Reading Railway Company transports anthracite coal from the Lehigh region to Philadelphia for local delivery, by arrangement with the Central Railroad Company of New Jersey and the Lehigh Valley Railroad Company. The totals of the proportional rates so charged upon the gross ton are as follows:

For prepared sizes, .....	\$1.86
For pea coal, .....	1.56
For sizes less than pea, .....	1.41

(c). The Philadelphia and Reading Railway Company also

transports anthracite coal from the Wyoming region to Philadelphia for local delivery by arrangement with the Lehigh Valley Railroad Company and the Central Railroad Company of New Jersey, under the terms of which the rates charged are divided proportionately between them. The totals of the proportional rates so charged upon the gross ton are as follows:

For prepared sizes, .....	\$2.10
For pea coal, .....	1.73
For sizes less than pea, .....	1.54

(d). The Pennsylvania Railroad Company transports anthracite coal from the Lehigh region to Philadelphia for local delivery by arrangement with the Lehigh Valley Railroad Company and the Central Railroad Company of New Jersey. The rates per gross ton are as follows:

For prepared sizes, .....	\$1.75
For pea coal, .....	1.45
For sizes less than pea, .....	1.30

(e). The Pennsylvania Railroad Company transports anthracite coal from the Wyoming region to Philadelphia for local delivery, either over its own lines or by arrangement with the Lehigh Valley Railroad Company, the Central Railroad Company of New Jersey, the Delaware, Lackawanna and Western Railroad Company or the Delaware and Hudson Railroad Company. The rates in each instance are upon the gross ton as follows:

For prepared sizes, .....	\$1.80
For pea coal, .....	1.50
For sizes less than pea, .....	1.35

From 1900 to 1912, inclusive, the total tonnage of anthracite coal transported by the Philadelphia and Reading Railway Company ran from 7,932,891 tons in 1903 to 13,537,464.02 tons in 1908, and such tonnage in 1912 was 11,224,945.01 tons. Any change in the rates for transportation would affect about forty per cent. of this tonnage.

During the years from 1907 to 1912, the anthracite coal transported by the Pennsylvania Railroad Company to Philadelphia for local delivery ran in tonnage from 1,249,383 tons in 1908, to 1,582,085 tons in 1911.

The average distance over which each ton of anthracite coal is transported from the Schuylkill region to Philadelphia by the



Philadelphia and Reading Railway Company, is one hundred twenty-one miles. The average distance over which each ton is transported by the Pennsylvania Railroad Company from the Schuylkill, Lehigh and Wyoming regions to Philadelphia is one hundred and eighty-eight and six-tenth miles; or more in detail, the average distance from the Schuylkill region is one hundred and sixty-three and five-tenth miles, from the Lehigh region, one hundred and sixty-six and six-tenth miles, and from the Wyoming region two hundred and twenty-two and four-tenth miles.

It has been found, and the finding has been sustained by the Supreme Court of the United States in a recent case, that the Reading company, from which the Philadelphia and Reading Railway Company leases its equipment, owns or controls forty-four per cent., the Lehigh Valley Railroad Company sixteen and eighty-seven hundredths per cent., the Delaware, Lackawanna and Western Railroad Company six and fifty-eight hundredths per cent., and the Central Railroad Company of New Jersey nineteen per cent., or altogether eighty-six and forty-five hundredths per cent. of all the unmined anthracite coal.

In addition to this large percentage, it appears from the testimony of Morris Williams in the present case, the president of the Susquehanna Coal Company, that he looked after the management of the coal companies for the Pennsylvania Railroad Company, that this transportation company owned all of the stock (\$2,136,000.00) of the Susquehanna Coal Company, except a few shares necessary to qualify the board of directors, that it held a debenture bond of the coal company for \$6,000,000.00, that the stock of the Mineral Railroad and Mining Company was owned one-third by the Pennsylvania Railroad Company and two-thirds by the Northern Central Railroad Company, that the stock of the Summit Branch Mining Company was owned by the Pennsylvania Railroad Company, that the Susquehanna Coal Company owned twelve coal mines and three washeries, that the Mineral Railroad and Mining Company owned six mines and one washery, and that the Summit Branch Mining Company owned two mines and two washeries, and that these companies bought the coal produced by other independent mining companies under a general contract, one of the terms of which was that the producing companies should receive sixty-five per cent. of the price of the prepared

coal. These facts, showing in some instances ownership, and in others control of the production of anthracite coal, are important to be borne in mind when the question of the effect of competition comes to be considered. It is also a fact of some importance for the proper determination of the matters before the Commission that the railroad companies which are the respondents furnish practically the only means by which anthracite coal may be transported to Philadelphia.

The Schuylkill Navigation Company, with its canal following the course of the Schuylkill river, for many years and with its supply of boats furnished such a means of transportation, but it was absorbed and is now controlled by the Reading Company, and does little or no business of this character.

It is claimed by the complainants, including the City of Philadelphia, which as a municipality used in 1911 one hundred and forty thousand nine hundred tons of anthracite coal, that the rates above set forth are unreasonably high, and discriminate against the city, and the residents within its boundaries. This claim is disputed by the respondents, who deny that the rates as fixed are unreasonable, or in any way discriminatory. The question thus raised is one of great complication and difficulty.

The transportation of anthracite coal is a business which has grown to large proportions, and seems to be rapidly increasing in volume. In one important respect, which has to be duly considered, it differs in character from the transportation of most other commodities. The cars in which coal is carried are specially constructed for the purpose, and when they return to the mines from the city where they have been unloaded, they are as a general thing empty, so that they have to traverse the intervening distance twice for one payment of freight. The transportation companies are entitled to establish such rates of freight as will give them a reasonable return for their outlay and upon their necessary investment, and anthracite coal ought to bear its proper proportion of such rates. On the other hand, a great city which lies approximately near to the fields of anthracite coal ought not to be burdened with an undue share of the cost of transportation because of the fact that it is dependent upon this supply for heat and power, and has no other resource for getting it transported.

It is argued by counsel for the Philadelphia and Reading Railway Company that "In the Schuylkill region, she (nature) has set these deposits of anthracite deep in the bowels of the earth, and by gigantic convulsions and distortions has so pitched the veins that the mining of anthracite there is a difficult, dangerous, wasteful and precarious business." With these difficulties, great as they may be, we have nothing to do. Miners and mining companies and corporations appear to have been willing to assume them. Whatever may have happened in the conduct of the business of mining, and transporting coal, it is necessary that we should draw a broad line of distinction between the getting of the coal in the bowels of the earth and the bringing of it to the surface, and its subsequent transportation to the market. It is the latter alone which concerns the present inquiry.

There are several series of facts to be deduced from the voluminous testimony which has been presented that are helpful to the Commission in its efforts to reach a correct solution of this troublesome investigation.

At the outset, there is a presumption against the propriety of the continuance of the existing rates. All of those rates have remained as they were established many years ago, some for forty years, some for twenty-four, and the most recent of them for seventeen years. In the meantime all of the surrounding conditions have changed. Larger cars are gathered into longer trains, to be drawn by more powerful engines. From three to four thousand tons are now handled in trains of sixty-five cars each. The volume of traffic has immensely increased. The cost of iron and other material is no longer the same. The price of labor has very much increased. The rates of freight upon all other commodities have been lowered. It is, therefore, apparent that rates which were applicable to the conditions which existed at a time so remote, if railroad experience proved them to be reasonable at that time, cannot in the nature of things be so now. This presumption does not go to the extent of indicating that they ought to be raised or that they ought to be lowered, but only that they ought to be revised and changed so as to adapt them to present conditions.

We are enabled to get some light upon the question, even if imperfect, from the record of the transactions of the Schuylkill

Navigation Company, as they appear in the testimony which has been presented. The canal of this corporation ran from Port Carbon in the Schuylkill coal region to Philadelphia. It began the transportation of anthracite coal about the year 1825, and continued down to a comparatively recent period, although of late years the amount of such freight has very much dwindled. At the time of its greatest activity in the year 1859, it transported to Philadelphia 1,272,109 tons of anthracite coal, or about one-tenth of the quantity carried by the Philadelphia and Reading Railway in the year 1908, in which year that railway did its most extensive business in the transportation of that commodity. In some respects it furnishes a satisfactory means of comparison since its entire business was confined to the carrying of anthracite coal, and since the boats which it employed went back from Philadelphia to Port Carbon empty, there being little or no back haul. The coal was taken from the mines to the boats at Port Carbon for a long time in wagons, and afterward by rail. Prior to 1839 its rate per ton for such transportation was \$1.00 and in that year the rate fell to 90 cents. In 1842 it was 75 cents per ton. In 1845 it fell further to 36 cents per ton. In 1849 it advanced to 60 cents per ton and in 1850 to 70 cents per ton. The corporation was able to meet its fixed charges, pay its operating expenses, and make dividends during a considerable part of the time, these dividends between 1829 and 1842 running from six per cent. to eighteen and a half per cent. The dividend of this company in 1856 was eight per cent. and in 1857 four and a half per cent.

The Commission has had the benefit of the definite ascertainment of some of the elements of the cost of transportation of anthracite coal to Philadelphia upon both the Pennsylvania Railroad and the road of the Philadelphia and Reading Railway, and from each of the districts. The officials and accounting officers of these roads when on the witness stand, all testified in substance, not only that there had never been an ascertainment of this cost, in fixing the rates charged, but gave it as their opinion that it was practically impossible to make such an ascertainment. Thereupon the Commission engaged a competent firm of expert accountants of long standing and repute in their profession "to make an examination of the books, records, letters, contracts, papers and opera-

tions of the Pennsylvania Railroad Company and the Philadelphia and Reading Railway Company and ascertain therefrom, and from any and all other sources of pertinent information, what is the cost to each of these companies of the transportation of anthracite coal from the respective mining sections of the eastern part of Pennsylvania to Philadelphia."

These accountants, after making a careful and thorough examination, reported that the distance over which anthracite coal was so transported by the Philadelphia and Reading Railway Company was one hundred and twenty-three miles, and that the cost was per gross ton in cents .....44.698

They further reported that by the route from the Schuylkill district over the Shamokin, Susquehanna, and Philadelphia divisions of the Pennsylvania Railroad, by way of Sunbury and Rockville, the distance was one hundred and eighty-seven miles, and the cost per gross ton in cents .....61.043.

That by the route from the Schuylkill district, by way of Millersburg and the Susquehanna division of the Pennsylvania Railroad, the distance was one hundred and fifty-three miles, and the cost per gross ton in cents .....54.378.

That by the route from the Lehigh district to Pottsville and and over the Schuylkill division of the Pennsylvania Railroad, the distance was one hundred and four miles, and the cost per gross ton in cents .....60.613.

That by the route from the Lehigh district to Mount Carbon, and over the Schuylkill division of the Pennsylvania Railroad, the distance was ninety-nine miles, and the cost per gross ton in cents .....60.848.

That by the route from the Wyoming district over the Sunbury division to Sunbury, and thence over the Susquehanna division of the Pennsylvania Railroad, the distance was two hundred and eighteen miles, and the cost per gross ton in cents .....65.290.

That by the route from the Wyoming district over the Lehigh Valley Railroad and the Schuylkill division of the Pennsylvania Railroad, the distance was one hundred and sixty-five miles, and the cost per gross ton in cents .....77.420.

That by the route from the Wyoming and Lehigh districts over the Pennsylvania Railroad by way of Manunka Chunk and Coalport, the distance was one hundred and three miles, and the cost

per gross ton in cents .....57.235.

By way of Belvidere and Coalport, the distance was ninety-nine miles, and the cost per gross ton in cents .....55.587.

By way of Martins Creek and Coalport, the distance was ninety-three miles, and the cost per gross ton in cents .....53.114.

By way of Philipsburg Junction and Coalport, the distance was eighty-five miles, and the cost per gross ton in cents .....49.816.

Some of these findings at least are disputed by the respondents, but if this report may be accepted as correct, it appears that while the rate charged from the Schuylkill district is \$1.70 per gross ton by each road, the cost of transportation upon the Reading Railway is 44.698 cents per gross ton, and the cost of such transportation upon the Pennsylvania Railroad from the different regions ranges from 49.816 cents to 77.420 cents per gross ton. This cost was based upon the accounts for the year ending May 31, 1913.

The experts ascertained only the operating costs, and did not enter into the question of a reasonable return upon investments in property, or of interest and the bonded indebtedness. In estimating the cost, however, they took into consideration the maintenance of way and structures, of equipment, traffic expenses, the transportation expenses, and the general expenses, and these in their subdivisions included the details of wear and tear, depreciation, and obsolescence, the payments for superintendence, injuries to persons, and stationery and printing, for the roadway, bridges and tunnels, for signals, telegraph and telephone lines, for locomotives and cars, wages of employees, fuel and lubricants, and for insurance, law and taxes. While therefore, this report does not furnish a complete ascertainment of the cost, since it omits what ought to be allowed for return upon the investment, it does furnish certain elements of that cost with definiteness which are of importance in the determination of the question as to what would be a reasonable rate.

There is some light, though perhaps meagre, to be gathered from the rates charged by these and other railroads for the transportation of bituminous coal. This product differs from anthracite in its chemical and physical composition, and in the uses to which it is applied, but nevertheless it is dug from the earth in pretty much the same way, hauled to the market in similar cars, and is used in various ways for the generation of heat. In method

and cost of transportation, it furnishes probably a reasonably close parallel. Bellis, a witness for the complainant, testified that from tariffs he examined in the office of the Pennsylvania Railroad Company he found that that company hauled bituminous coal from the Clearfield region to Philadelphia at the rate of 4.77 mills per ton per mile, there to be dumped on vessels; from the Greensburg district, at the rate of 5.4 mills per ton per mile for local delivery; and that the same railroad hauled bituminous coal from the Clearfield region to Philadelphia for local delivery at the rate of 6.1 mills per ton per mile. He further testified that the Philadelphia and Reading Railway Company hauled bituminous coal from the Beech Creek district from Newberry Junction to Port Reading at the rate of 5.03 mills per ton per mile, which is a tidewater rate, including dumpage, and from the Beech Creek district to Philadelphia for trans-shipment at the rate of 5.46 mills per ton per mile. There was also evidence produced to show that the Chesapeake and Ohio Railroad Company hauls bituminous coal from the Marrow Bone region in Kentucky to Newport News on the Chesapeake Bay, a distance of six hundred and seventy-three miles, at the rate of 2.53 mills per ton per mile. The freight traffic manager of the Philadelphia and Reading Railway testified that the rate per ton per mile on the transportation of anthracite coal averaged 9.035 mills in 1907, and 8.599 mills in 1912.

Counsel for the Philadelphia and Reading Railway Company offered in evidence a statement showing a comparison through a series of years between the rate per ton per mile in mills on all freight carried upon that railroad, and on anthracite coal carried by it, as follows:

	<i>Anthracite.</i>	<i>All Freight.</i>
1907, .....	9.035	7.366
1908, .....	8.754	7.090
1909, .....	8.919	7.411
1910, .....	9.046	7.119
1911, .....	8.735	7.038
1912, .....	8.599	7.021

An even more satisfactory basis of comparison than any of these hertofore discussed is the rate charged for the transportation of that part of the anthracite coal product which is shipped

to Philadelphia over the railroads of the respondents, and is intended for trans-shipment to New York, Boston and other places commercially described as "outside the capes." Upon this coal the rates to Philadelphia upon both the Pennsylvania Railroad and the Philadelphia and Reading Railway are forty cents a ton less than that intended for local delivery. We, therefore, have an illustration of the same kind of coal, gathered at the same points of shipment, carried on the same kind of cars, and sent forward to the same point of destination. The presumption is that the rates charged for this coal, which is shipped to points "outside of the capes," have been found to be compensatory, or after a test of years they would have been discontinued. We are, however, not left to depend entirely upon presumption. John F. Auch, the traffic manager for the Philadelphia and Reading Railway Company, testified:

"Q. This rate of \$1.30 for over piers below capes is a profitable rate, isn't it?"

"A. I think our rates are all reasonably profitable, all the circumstances considered. I will assume that our rates are reasonably profitable, all circumstances considered."

Robert H. Large, the general coal freight agent of the Pennsylvania Railroad Company, testified upon this subject:

"Q. Is it profitable to the railroad company?"

"A. Your Honor, that depends upon what you mean by profitable. There is no question that there is much traffic moving over all the railroads that does not bear its proportion, if that can be arrived at, of interest charges on capital, but that does pay the actual cost of transshipping it, and thus assist in reducing the cost of transporting all traffic \* \* \* Let me put it another way. Not being able to ascertain the cost, I do not know whether it pays or not, but the assumption is that it does."

The explanation of the lesser rate for anthracite coal to Philadelphia intended to be shipped "outside of the capes" is that such diminution of the rate is due to competition in the localities to which it is to be transported. Thus Large testified:

"In order to meet competition of bituminous coal, or anthracite coal reaching the Atlantic seaboard and other points, your trans-shipment rate must of necessity bear a



relation to the trans-shipment rate at other points. For example, the D., L. & W. distance to Hoboken is about 140, 142, 143, 144 miles. Their rate to Hoboken prior to the decision in the Marian case was \$1.58. The rate to Philadelphia must, if any coal is to be moved through Philadelphia, bear such a relation to that rate, as adding up the rate to Philadelphia, the current back freight from the port, we will say to Boston, so that the two will about or as nearly as possible equal the actual rate to New York Harbor, plus the boat rate from New York to Boston."

The witness further said that the fact that the trans-shipment rate is less than the local rate was not peculiar to the anthracite coal traffic, but was general on all traffic. This reasoning, however, is not altogether convincing. In the first place, the transportation of anthracite coal to Philadelphia is not like the transportation of general freight in which most railroads are engaged. It differs in so many features from general transportation as perhaps to require that it be put in a class by itself. Anthracite coal is a bulky commodity, hauled in a special manner, and requiring little or no care in the course of transportation, not liable to disintegration or destruction. Its source of supply is confined to a comparatively narrow area, and lies approximately close to one of the most populous cities of the country. The necessities of the people require a continuously replenished supply and, therefore, the cars sent to the coal districts are always sure of the freight they are to carry.

In the second place, with respect to this particular situation, the fact of actual competition is at least open to query. It is true that it has become a well settled principle of rate making, that in determining whether or not there has been a discrimination against freight locally delivered, the question of the effect of competition in the through freight, if it exists, is to be given due consideration. It is impossible to follow the evidence in this case without reaching the conclusion that the respondent railroad companies exercise an extended influence over the output and disposition of anthracite coal. As has been heretofore pointed out, the Reading Company and the Pennsylvania Railroad Company, with their affiliated companies, own or control the great bulk of the unmined anthracite coal. The extension of this control is seen in the fact.

testified to by numerous witnesses, that many of the coal yards in Philadelphia are owned by these companies. It may also be assumed that, although the evidence is that there is no definite agreement between them as to rates, there is a tacit understanding of some kind which brings them into accord, or the rates upon both roads from the Schuylkill district to Philadelphia, with differing distances, would not have reached precisely the same figures upon all three of the different grades of coal. These facts, to a certain extent at least, weaken the argument based upon the necessity of meeting competition "outside of the capes." There was much testimony given in a general way as to competition between anthracite and bituminous coals, but that evidence was to the effect that such competition was mainly between the bituminous and the sizes of anthracite smaller than pea. With respect to these sizes, T. B. Koons, the traffic manager of the Central Railroad of New Jersey, testified that they were in the nature of a by-product, the residuum necessarily left in the production of the prepared sizes, which when sold, were regarded as having made an addition to income, and that in many places they had displaced bituminous because of lesser cost and the nuisance created by the smoke resulting from the burning of bituminous coal.

The dividends declared by the Reading Railway Company upon capital stock of \$20,000,000.00, increased to \$42,481,700.00 in 1912, have been since 1904 as follows:

1904, .....	12 per cent.
1905, .....	20 per cent.
1906, .....	30 per cent.
1907, .....	30 per cent.
1908, .....	30 per cent.
1909, .....	25 per cent.
1910, .....	25 per cent.
1911, .....	25 per cent.
1912, .....	15 per cent.

The principal source of revenue to the Reading Company is derived from the transportation business of the Philadelphia and Reading Railway, and the Philadelphia and Reading Coal and Iron Company appears to add nothing to its income. Of the tonnage of the railway company 24.2 per cent. consists of anthracite

coal, and Large tells us that of all the business of the railroad the local traffic, which includes anthracite, is the most profitable.

The Philadelphia and Reading Railway Company presented a statement showing its property, investment, materials and supplies, and cash working assets as of June 30, 1913, as follows:

Road and equipment, .....	\$94,724,974 02
Improvements and Betterments, ..	26,482,279 20
Materials and supplies, .....	2,795,844 59
Cash working assets, .....	3,950,315 92

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\$127,953,413 73

It appears, however, that this company is in possession of equipment under leases from the Reading Company, and that it pays a rental for the equipment of \$2,253,109.08 per annum.

The problem to be solved is, taking all of the facts and circumstances into consideration, to ascertain what will be a fair and a reasonable rate, giving to the railroads a reasonable return on the moneys they have invested and a reasonable compensation for the services they render, and which will not be unduly burdensome upon the consumer, and will not compel him to pay more than his fair proportion of the expenses of the maintenance of the services and of a reasonable return upon the investment. The Commission ought to bear in mind the fact that the maintenance and proper extension of railroad service is essential to the growth, development, welfare and convenience of the people of the country, and viewing the subject broadly may properly take notice of of the fact that within the last few years conditions have been such that these public conveniences, having as a general thing struggled through a profitless period of financial stress and difficulty, and attained success, have not been as prosperous as formerly. Their stock is held by people in all classes in the community, who have invested in such securities their savings and accumulations, and these investors are entitled to have their interests fairly treated. It may also be said that no financial operation is likely to thrive which has too much outside direction. On the other hand, the relation of Philadelphia to the anthracite coal deposits presents to us an extremely unusual situation. A city, whose founders locate it upon the banks of a river, may well claim that it is entitled to the benefit of the transportation which the

facilities of the river afford. An iron furnace which is near the ore beds, or the lime beds, or the fuel supply derives an advantage in its trade output because of the fact, and surely the proximity of Philadelphia to the deposits of anthracite coal is a natural advantage of whose benefits she ought not to be deprived. The very purpose which the Commonwealth had in view in granting the rights and privileges contained in the charter of the Philadelphia and Reading Railway Company was that the anthracite coal might be carried to Philadelphia, and the compensations to the State were that her citizens should be so supplied. We may all rejoice that the usefulness of the railroad has been extended to other states, and to other activities, but its primary object should not be permitted to be forgotten. Any effort to make Philadelphia pay higher rates because her only means of securing this necessity of life is through the transportation afforded by the respondent roads, and in order that consumers in Boston or New Orleans may get their coal more cheaply, would be a reversal of the natural order of events, and ought not to be permitted.

After a careful consideration of all of the facts, giving due weight to the large amounts invested in this traffic by the respondents, endeavoring to determine what would be a due return upon these investments, and proper compensation for their service, we have reached the conclusion that the experience of the respondents has itself established the measure of what would be a fair and reasonable rate for the transportation of anthracite coal to Philadelphia when that experience established the fact that the rates now charged for such coal shipped "outside the capes" was a profitable charge. We think, therefore, that the rates for the local delivery of coal in Philadelphia as now existing ought to be reduced forty cents a ton, except for sizes less than pea, and that the rates upon these sizes should be the same as upon pea coal. The effect of this reduction will be to put Philadelphia in this respect on an equality with the other cities and ports of the country.

If it be true that the existing rates covering all freights upon the railroads of the country are insufficient to afford them a proper return upon their investments, it is entirely clear that the method of correction should be a general advance in such a manner as to equalize the burdens and to affect alike all interests and all sub-

jects of traffic and transportation. To secure adequate returns by placing unequal burdens upon localities and commodities where it may be possible would be an imperfect and unsatisfactory method which ought not to be tolerated.

In accordance with this conclusion reached, the rates upon anthracite coal sent by direct routes to Philadelphia, from the Schuylkill district and consigned for local delivery by the Philadelphia and Reading Railway Company and by the Pennsylvania Railroad Company, will be fixed and determined as follows, per gross ton:

For prepared sizes, .....	\$1.30
For pea coal, .....	1.00
For sizes less than pea, .....	1.00

Upon anthracite coal sent from the Lehigh region to Philadelphia for local delivery by the Philadelphia and Reading Railway Company, by arrangement with the Central Railroad Company of New Jersey and the Lehigh Valley Railroad Company, as follows, per gross ton:

For prepared sizes, .....	\$1.46
For pea coal, .....	1.16
For sizes less than pea, .....	1.16

Upon anthracite coal sent from the Wyoming region to Philadelphia for local delivery by the Philadelphia and Reading Railway Company, by arrangement with the Central Railroad Company of New Jersey and Lehigh Valley Railroad Company, as follows, per gross ton:

For prepared sizes, .....	\$1.70
For pea coal, .....	1.33
For sizes less than pea, .....	1.33

Upon anthracite coal sent from the Lehigh region to Philadelphia by the Pennsylvania Railroad Company, by arrangement with the Lehigh Valley Railroad Company and the Central Railroad Company of New Jersey, as follows, per gross ton:

For prepared sizes, .....	\$1.35
For pea coal, .....	1.05
For sizes less than pea, .....	1.05

Upon anthracite coal sent from the Wyoming region to Philadelphia for local delivery by the Pennsylvania Railroad Company either over its own lines or by arrangement with the Lehigh Val-

ley Railroad Company, the Central Railroad Company of New Jersey, the Delaware, Lackawanna and Western Railroad Company, or the Delaware and Hudson Railroad Company, as follows, per gross ton:

For prepared sizes, ..... \$1.40

For pea coal, ..... 1.10

For sizes less than pea, ..... 1.10

A considerable proportion of the anthracite coal intended for local delivery in Philadelphia is carried by the respondent companies to certain points upon the Delaware and Schuylkill rivers and there unloaded upon barges, which transport the coal to the wharves and other places of delivery along these rivers. For this service the barges make a charge of twenty-five cents per ton or other definite sum. The respondents have heretofore arranged their rates, that these rates together with the barge charges shall be substantially equal to the charges for local delivery by track service. It is the opinion of the Commission, that the rates of delivery upon barges shall be so reduced as to make them, with the added charges of the barges with respect to each class of coal, equal in amount to the rates heretofore designated for local delivery by track service.

An order will be issued accordingly.

#### ORDER.

*And now, to wit*, December 12, 1914, this case being at issue upon complaints and answers on file, and being a case pending before and undisposed of by the Pennsylvania State Railroad Commission at the time of the establishment of The Public Service Commission of the Commonwealth of Pennsylvania, under and pursuant to the Public Service Company Law approved July 26th, 1913, and having been duly heard by the Pennsylvania State Railroad Commission, and duly heard and considered by The Public Service Commission of the Commonwealth of Pennsylvania under the provisions of the said act relating to the unfinished business of the said Pennsylvania State Railroad Commission; and The Public Service Commission of the Commonwealth of Pennsylvania, having, in the report hereto attached and made a part hereof, set forth its findings of fact and conclusions thereon.

*It is hereby ordered:* That the respondent railroad companies, to wit, the Philadelphia and Reading Railway Company, the Pennsylvania Railroad Company, the Central Railroad Company of New Jersey, the Lehigh Valley Railroad Company, and the Delaware, Lackawanna and Western Railroad Company within thirty (30) days from the date of this order, and upon five (5) days' notice to this Commission, by tariffs or supplements to tariffs filed, posted and published as required by law for the transportation of anthracite coal from the Lehigh, Schuylkill and Wyoming regions to Philadelphia for local delivery by the respondents, the Philadelphia and Reading Railway Company and the Pennsylvania Railroad Company at Philadelphia, shall put into effect the rates which are found and determined and set forth in the attached report of the Commission, as the fair, just and reasonable rates for such transportation, making such adjustments of the now existing rates as may be necessary to carry this order into effect.

By the Commission,

FRANK M. WALLACE, *Acting Chairman.*

#### BOROUGH OF GETTYSBURG'S PETITION.

*Municipalities—Erection of light plant for supplying light for streets—Approval of the Commission—Act of July 26, 1913, Article I, Section 1, P. L. 1375, and Article III, Section 3, (d), P. L. 1388.*

The petitioner, the Borough of Gettysburg, requested a Certificate of Public Convenience evidencing the Commission's approval of the construction and operation by the petitioner of an electric light plant for the purpose of supplying light for the streets, etc., of the said borough, "if such a certificate is necessary and required by the Public Service Company Law."

*Held:* The certificate of the Commission is not necessary. The proviso of Article I, Section 1, of the Public Service Company Law, exempts from the operation of the law all producers of light, heat, etc., engaged in producing exclusively for their own use and not for sale to others. Article III, Section 3, (d) is designed to prevent a municipality, without the approval of the Commission, from engaging in a business which would compete with a public service company furnishing like service in the municipality. Accordingly, a municipality desiring to produce light for its own use in lighting its streets, and not for sale in competition with a company rendering such service to the public, need not secure the approval of the Commission.

## APPLICATION DOCKET No. 298.

## Report and Order of the Commission.

Submitted October 8, 1914.

Decided December 4, 1914.

*William N. Trinkle and Berne H. Evans*, for the Commission.*J. Donald Swope*, for the petitioner.*J. L. Williams and A. M. Beitler*, for the protestant.

## BY THE COMMISSION:

The Borough of Gettysburg filed a petition praying for a certificate of public convenience evidencing the Commission's approval of the construction and operation by the said borough of an electric light plant for the purpose of supplying electricity for lighting the streets, alleys, highways, and other public places within the borough, "if such a certificate is necessary and required by the Public Service Company Law." A protest was entered by the Gettysburg Light Company and a hearing, at which both the petitioner and respondent were represented by counsel, was held on November 4th, to determine the preliminary question of the necessity of the borough to obtain the approval of the Commission before constructing and operating an electric light plant for furnishing electricity to light its streets and not for sale to others.

Article III, Section 3 (d), of the Act of Assembly approved July 26, 1913, provides:

"Upon the approval of the Commission, evidenced by its certificate of public convenience, first had and obtained, and not otherwise, it shall be lawful for any municipal corporation to acquire, construct, or begin to operate any plant, equipment or other facilities for rendering or furnishing to the public of any service of the kind or character already being rendered or furnished by any public service company within the municipality."

It is contended by the petitioner in this proceeding that the Borough of Gettysburg, as shown by the ordinance enacted on August 26, 1914, a copy of which is attached to the petition, does not intend nor has it the power under said ordinance to furnish electricity to the public, but simply for its own use in lighting the streets and highways, and for this reason comes within the terms



of the proviso contained in Section 1 of Article I of the Public Service Company Law which reads as follows:

"That none of the provisions of this act shall apply to the generation, transmission or distribution of electricity; to the manufacture or distribution of gas; to the furnishing or distribution of water; or to the production, delivery or furnishing of steam, or any other substance for heat or power by a producer who is not otherwise a public service company, for the sole use of such producer, or for the use of tenants of such producer, and not for sale to others."

The purpose of this proviso, as so clearly appears from the language used, was to exempt from every and all of the provisions of the act, a producer, not otherwise a public service company, who furnishes electricity, gas, water, etc., for his own use and not for sale to others. The borough in this case can not be considered, "otherwise a public service company" for the reason that in the definition of the term "public service company" (Section 1, Article I) no mention is made of a municipality.

The Borough of Gettysburg, as well as every other customer of the Gettysburg Light Company has the right, in the absence of a contract, to discontinue the service furnished by the said light company, and to light its streets by means of candles, oil or acetylene gas. No power exists in this Commission to compel the borough to take the service furnished by the light company, nor can it determine where the borough shall buy the candles, oil, or how obtain the acetylene gas it might desire to use for lighting its streets. We can see no distinction between a municipality generating its own electricity for lighting its streets and making candles or acetylene gas for the same purpose.

The courts have recognized a clear distinction between the rights under which a municipality furnishes electricity for its own use and where in addition furnishes it to the public. In the first instance it is exercising a governmental function and in the latter is engaged in a business. The purpose of Article III, Section 3, (d), of the act was to prevent a municipality, without first securing the approval of the Commission, from engaging in a business which would compete with a public service company furnishing like service in the municipality, and not to interfere with a truly governmental function of the municipality.

We are of the opinion that the proviso in Section 1 of Article I of the Public Service Company Law clearly exempts the borough of Gettysburg in the construction and operation of an electric light plant for supplying electricity, for lighting its streets and not for sale to others from the provisions of Article III, Sec-3, (d), of said act of assembly. To hold a contrary opinion would mean that no municipality in the State of Pennsylvania, without first securing the approval of the Commission, could install its own stoves or heat plant in its municipal buildings, if a corporation were at the time furnishing heat to the citizens and to the public buildings in the municipality. This certainly was not the intention of the legislature.

An order will therefore, be entered dismissing the petition for lack of jurisdiction.

#### ORDER.

This case being at issue upon petition and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof made and filed of record a report, containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

Now, to wit, December 4, 1914, *It is ordered:* That the petition be and the same is hereby dismissed.

By the Commission,  
FRANK M. WALLACE, *Acting Chairman.*

#### PERKIOMEN ELECTRIC TRANSIT COMPANY'S PETITION.

*Foreign public service company—Trackless trolley—Purpose not authorized by our laws—Certificate of Public Convenience—Convenience, etc., of the public—Act of July 26, 1913, Article III, Section 3 (b), P. L. 1388, and Article V, Section 18, P. L. 1414.*

The applicant, a Delaware corporation, petitioned for the issuance of a Certificate of Public Convenience authorizing it to engage in the business of operating a trackless trolley in the State of Pennsylvania.

*Held:* 1. As the legislature has never limited and defined the corporate rights and privileges of such companies and has not provided for their regulation and control, the Commission will not, under Article III, Section 3 (b) of The Public Service Company Law, give its approval for the operation of such a company in this Commonwealth. The regulatory power exercised by the Commission presupposes to a large extent the definition and limitation by the legislature of the rights and powers of the company regulated.

2. Under Article V, Section 18, of the said act, which provides that the Commission shall give its approval only when it shall find that such approval is necessary and proper for the service, accommodation, convenience or safety of the public, the question is not merely whether the community proposed to be served will be benefited by the service, but whether, in the entire absence of legislative regulation of the rights and powers of such a corporation, the approval would be proper for the service, etc., of the public. The Commonwealth has been careful to regulate the use of its streets and roads by street railway companies, and the approval of the operation upon them of a transportation system unregulated and uncontrolled by any state laws, would not be proper for the service, etc., of the public.

3. The Commission will not authorize a foreign corporation to conduct a business here which the laws of this State do not empower her own corporations to carry on.

#### APPLICATION DOCKET No. 69.

#### Report and Order of the Commission.

Submitted May 22, 1914.

Decided January 8, 1915.

*J. I. Comly and Paul G. Smith, for the petitioners.*

#### COMMISSIONER TONE:

The applicant is a corporation of the State of Delaware, and the purpose of its incorporation briefly stated, is, inter alia, the construction and operation of a trackless trolley, and in connection therewith the right to erect and own power plants and distribution lines used in operating the said electric trolleys. The company has registered under the Act of June 8, 1911, to do business in the State of Pennsylvania. The present application of the company is to obtain a Certificate of Public Convenience authorizing it to do business within this Commonwealth, this certificate being required by the provisions of Article III, Section 3 (b) of The Public Service Company Law, which provides that upon the approval of the Commission, evidenced by its Certificate of Public Conve-

nience, first had and obtained, and upon compliance with existing laws and not otherwise, if any such laws there be "permitting such foreign company to exercise its powers and franchises within this Commonwealth," it shall be lawful to obtain the right to do business within this Commonwealth.

In Article V, Section 18, of The Public Service Company Law, it is expressly provided that "such approval in each and every such case or kind of application shall be given only if and when the said Commission shall find or determine that the granting or approval of such application is necessary or proper for the service, accommodation, convenience or safety of the public."

The Commission has examined and considered the testimony and arguments produced by the applicant to show the necessity and propriety of the approval of this application. The transportation needs of the community and the ability of the applicant to supply the same by its trackless trolley system have been brought to the attention of the Commission in a very thorough and detailed manner and have been carefully weighed by it.

It may be that the installation of such a system would be of benefit to the community, but the proper determination by the Commission of the essential issue above defined in the statute, viz: whether the approval applied for "is necessary or proper for the service, accommodation, convenience or safety of the public" involves, under the present application, a broader inquiry. It involves the question not merely whether the transportation of the kind offered by such a trackless trolley system is necessary or proper for the accommodation or convenience of the public, but whether such service, rendered in the course of the business proposed to be carried on by the particular applicant corporation would, in view of the entire absence of legislative regulation of the rights and powers of such a corporation, be proper for the service, accommodation, convenience or safety of the public.

The Commonwealth has adopted a broad policy in relation to the improvement of the public roads and highways in country districts, and large sums are constantly being expended on the construction and maintenance of such public improvements. While the Commonwealth has been vigilant in regulating by law the right of street railway companies to use streets and roads, yet the legislature has not clearly indicated the policy of the State in regard

to the use of such highways by transportation companies using a means of transportation such as a trackless trolley system that was not in contemplation a short time ago. No means of securing to the State an adequate recompense for the right of such transportation companies to use these great public improvements so essential to the best interests of the State, has been provided, nor has the legislature defined the corporate rights and powers of such companies on the highways, and until some policy on this question is adopted by the legislature it is the judgment of the Commission that the doing of business by such a transportation company, involving such an unregulated use of the highways, is not proper for the service, accommodation, convenience or safety of the public.

It may be true that the delegated power of this Commission to regulate the exercise of the rights of public service companies is sufficiently comprehensive to include the regulation of the operation of the applicant company, but that regulatory power presupposes, to a very large extent, the definition and limitation by the legislature of the corporate rights and powers of such a company. We have no indication in any act of assembly as to what the legislative policy of the Commonwealth is with regard to corporate rights and powers of companies such as the applicant, the purpose of which has apparently not been considered by the legislature. There may be a great many restrictions and conditions that the legislature will desire to adopt on this subject if it is brought before it, but in the present state of the law of the Commonwealth, as interpreted by its attorney general, there is no legislative enactment under which a company can be incorporated in Pennsylvania for the purpose of carrying on the trackless trolley business, nor is there any legislative regulation as to the conduct of such business by such a corporation. It thus appears that the applicant desires to obtain from this Commission the right to engage in a business of a character which the laws of Pennsylvania do not as yet authorize her own corporations to carry on. For this very reason the applicant has obtained a charter from the State of Delaware and asks this Commission to grant it the right to transact the above mentioned business as a Delaware corporation, in pursuance of such Delaware charter, and thus seeks, through the approval of this Commission, to accomplish by indi-

rection that which cannot be done directly, under the existing laws of Pennsylvania.

It is not every foreign corporation that can obtain the right to do business in this State. Corporations may be formed in other states to engage in a business that the legislature of that state deems to be lawful and in accord with the public policy of that state, and yet that business may not be lawful or in accord with the public policy of Pennsylvania.

At the present time the legislature of this Commonwealth has made no provision for the operation of a trackless trolley over the public roads and highways of the Commonwealth even by its own corporations. The exercise in this State by a corporation of another state of rights in which the public is so vitally interested should be undertaken only if and when those rights have been considered and defined by the lawmaking body of this Commonwealth. Until such action has been taken it is the judgment of this Commission, as above stated, that the approval of the present petition of the applicant foreign corporation would not be proper for the service, accommodation, convenience or safety of the public.

Irrespective, therefore, of the further fact that by reason of the incorporation of a public service company in a state other than Pennsylvania, its capitalization is wholly beyond the regulatory control of this Commission, we are of opinion, after careful consideration, that the approval applied for by the applicant in the present case should be denied and an order will be made accordingly.

#### ORDER.

This case being at issue upon petitions on file, and having been duly heard and submitted by the parties, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

Now, to wit, January 8, 1915, it is ordered: That the petitions be and the same are hereby dismissed, and the Certificate of Public Convenience prayed for is refused.

By the Commission,  
FRANK M. WALLACE, *Acting Chairman.*

## GENERAL ORDER No 12.

*In Re Publication of Commission's Rulings, Regulations or Orders by Public Service Companies.*

It having come to the attention of the Commission that certain public service companies have been sending out written or printed notices or other such communications to their patrons, in which they have attributed to the Commission, from time to time, the making of alleged rulings, regulations or orders which, in point of fact, have not been made by the Commission as represented, and thereby have occasioned misunderstanding, confusion and inconvenience to their patrons and the public as to various matters, but especially with regard to the time and manner of payment of bills subject to discount:

*It is hereby ordered:* That the above practice shall be discontinued and that hereafter no administrative ruling, regulation or order shall, in any such written or printed notice or other communication whatsoever, be stated by any public service company to have been made by the Commission, unless an exact copy of the particular ruling, regulation or order so referred to is therein set forth at length and the date thereof also stated.

Copies of such rulings, regulations or orders may be had on application to the secretary of the Commission. Public service companies assume the risk of the accuracy of copies of rulings, regulations or orders obtained from any other source, and exact copies of all such notices sent by such companies to customers shall be filed with the secretary of the Commission within three days of date of issue thereof.

By the Commission,

FRANK M. WALLACE,  
*Acting Chairman.*

Attest:

A. B. MILLAR, *Secretary.*  
January 6, 1915.

**ATTORNEY GENERAL****IN RE CO-OPERATIVE BANKING ASSOCIATIONS.**

*Banking associations—Usury—Recording of articles of association—Acts of May 28, 1858, P. L. 622; May 23, 1878, P. L. 109, and May 18, 1893, P. L. 89.*

1. Co-operative banking associations incorporated under the Act of May 18, 1893, P. L. 89, are subject to the provisions of the Act of May 28, 1858, P. L. 622, fixing 6 per cent. as the lawful rate of interest, and to those of the Act of May 23, 1878, P. L. 109, making said rate applicable to the loans made by banking corporations. They have not been exempted from the provisions of these acts, as have building and loan associations.

2. The Act of May 18, 1893, P. L. 89, Sec. 2, requires that the articles of association of a co-operative banking association be recorded in the office of the "clerk of the county" in which the office of the association is located. Under this ambiguous provision the corporation should record its articles in the office of the recorder of deeds and of the prothonotary. If record should be refused in either office, an interpretation of the provision could be secured in a mandamus proceeding.

**ATTORNEY GENERAL BELL:**

This department is in receipt of your letter of October 1, 1914, enclosing for its consideration a copy of a brief filed by A. E. Hurshman, Esq., attorney for the Southward Co-Operative Banking Association of Philadelphia.

This brief considers two questions relative to co-operative banking associations incorporated under the Act of 18 May, 1893, P. L. 89, concerning which you have heretofore asked the opinion of this department.

The first question is whether such associations are permitted, under the law to charge more than 6 per cent. per annum interest for the loans which they make.

The Act of 28 May, 1858, P. L. 622, provides:

"That the lawful rate of interest for the loan or use of money, in all cases where no express contract shall have been made for a less rate, shall be 6 per cent. per annum."

By the Act of 23 May, 1878, P. L. 109, it was provided that:

"Hereafter every contract for the loan or advance of money, by banking corporations heretofore incorporated or hereafter to be incorporated under the laws of this Commonwealth, shall be



subject to the provisions of an act, entitled 'An act regulating the rate of interest,' approved May 28, 1858."

As was pointed out by Mr. Justice TRUNKY, in *Lebanon National Bank v. Karmany*, 98 Pa. 65, 1881, the Act of 1878 was not passed because banks had any right to charge usurious interest before the act was passed, but because "it was well to remove any ground for said fictitious claims, and in doing so no validity or sanction was given those which were previously made."

In this case it is clearly and emphatically pointed out that under the laws of the State of Pennsylvania it is illegal for parties to contract for a greater rate of interest than 6 per cent.

That this policy of the State is to be rigidly observed is evidenced by the strictness with which the courts have held agreements, which were essentially usurious, to be unlawful, however carefully their usurious character may have been disguised. A striking instance is found in the case of *Thompson v. Prettyman*, 231 Pa. 1 (1911), in which even the giving of a release was held not to prevent the recovery of a usurious charge.

In only one class of contracts has the prohibition against usury been lifted, and that is in the case of loans by building associations. The necessity for a direct legislative exemption of these associations was recognized, and it was provided by the Act of 29 April, 1874, P. L. 73, in Section 37, clause 6 (at page 98):

"No premiums, fines or interest on such premiums that may accrue to the said corporation according to the provisions of this act shall be deemed usurious, and the same may be collected as debts of like amount are now by law collected in this Commonwealth."

Even in the case of building associations the courts required that loans should be made after open bidding, in strict compliance with the provisions of the Building Association Act, in order that the building associations could take advantage of the exemption from the prohibition against usurious interest. An instance of that strictness is given in *Stoddart v. Myers*, 52 Super. 179 (1912). The requirement of open bidding has now been removed by the Act of 14 May, 1913, P. L. 205, which provides:

"No premiums contracted for under this section with or without bidding shall be deemed usurious, although in excess of the legal rate of interest."

It is very likely that building associations were exempted from the usury law on account of the fact that they were entirely co-operative and that the high interest paid by the member as a borrower was likely to be greatly reduced by the profits from the high interest rates paid by others and which came to him as a stockholder.

It may be that co-operative banking associations incorporated under the Act of 1893 might have been exempted by the legislature for a similar reason, although the purely co-operative features of a building association are not compulsory upon a co-operative banking association.

However that may be, the fact is that the legislature did exempt building associations from the usury laws, and that it not only did not exempt "banking corporations," but specially provided by the Act of 1878 that all such heretofore or hereafter incorporated should be subject to the usury law.

And while it may be true that if such associations are properly conducted, the excessive interest charges may be returned to the borrowers in the form of dividends, yet this constitutes no warrant to exempt such associations from the plain language of the Act of 1878. Moreover, the operation of a co-operative banking association is not sufficiently similar to the relation between partners who contract with each other for a return upon their capital in excess of 6 per cent., as to bring a borrower from a co-operative banking association within the rule laid down in the case of partners in such cases as *Duffy v. Gilmore*, 202 Pa. 444, 1902.

Further, the Co-operative Banking Act providing for the incorporation of co-operative banking associations expressly provides, as in the case of other corporations possessing banking and discounting privileges, that compliance must be had with the requirements of Section 11, Article XVI, of the Constitution. The act further provides that "no such association shall commence business until the financial standing, responsibility and character of the original stockholders shall have been approved and certified by the superintendent of the banking department of the Commonwealth." Such co-operative banking associations are also made subject to the control of the banking department by Section 1 of the Act of February 11, 1895, creating the banking

department, and defining its purpose and authority and designating what corporations shall be subject to supervision and exemption by the commissioner of said department.

In my opinion, therefore, as a result of what has been said, a co-operative banking association incorporated under the Act of 1893 is subject to the provisions of the Acts of 1878 and 1858 above mentioned.

You are, therefore, specifically advised that a co-operative banking association has no right to charge interest at the rate of more than 6 per cent. per annum.

The second question is whether the articles of association of a co-operative banking association should be filed and recorded in the office of the prothonotary of the court in which the association does business, or in the office of the recorder of deeds of said county.

The Act of 1893 provides in Section 2 that a copy of the articles "shall be filed and recorded in the office of the clerk of the county in which the office of the association shall be located, and the said clerk shall certify by his official signature and seal of his office that the said certified copy of said articles has been filed and recorded in his office."

There is no official in the counties of this State who is properly designated as the "clerk of the county." The use of those words in the Act of 1893 confirms the suspicion which a reading of the act engenders, that it was copied verbatim from the laws of some other state where the functions of such associations were better understood than they are in Pennsylvania.

Under the circumstances the safest rule for your department to adopt is to require recording in the office of the recorder of deeds of the county in which the office of the association is located, where the articles of association of other corporations must be recorded under the General Corporation Act of 1874, and also in the office of the prothonotary or clerk of the courts of such county, where partnerships must be registered under the Act of April 14, 1851, P. L. 615, Section 13.

If either of these offices refuse to accept the articles of association for record, mandamus proceedings may be brought and a judicial interpretation obtained of the ambiguous language of the Act of 1893.

## COUNTY COURT OPINIONS

MAMAUX v. UNION CASUALTY INSURANCE CO.

*Sale of stock—Rights of stockholders—Special agreement favoring certain stockholders—Powers of president and secretary.*

The plaintiff, upon purchasing some shares of stock from the defendant corporation, received a contract signed by the president and secretary of the corporation according to which 5 per cent. of the net premium income of the company received in this State was to be divided annually in cash for a period of ten years among those who held such agreements. These agreements were not authorized by the directors nor by the stockholders and only a part of the stockholders received them. Upon a suit brought by plaintiff to compel an accounting and a distribution in accordance with the agreement it was

*Held:* 1. The making of such an agreement to dispose of a large part of the net premiums of the company is not within the ordinary powers of a president and secretary.

2. Any authorization of such an agreement by the directors or stockholders would be ultra vires and illegal as an attempt on the part of the company to make an arbitrary distinction between stockholders of the same class as to the profits to be received.

3. The plaintiff is, therefore, not entitled to an accounting.

Bill for an accounting. In equity. No. 360, October Term, 1914. C. P. Allegheny County.

*Shaffer & Schoyer*, for plaintiff.

*Stone & Stone*, for defendant.

SHAFFER, J., October 29, 1914:

## FINDINGS OF FACT.

First.—The defendant is a casualty insurance company, organized under the laws of this Commonwealth, having been chartered on November 18, 1908.

Second.—On March 28, 1910, the stock of the company not having been all issued, an agreement concerning the purchase by plaintiff of stock in the company was entered into, the written evidence of which made at the time was in the form of an application for a stock option signed by the plaintiff and a grant of the option in pursuance thereof, signed by the president and sec-

retary of the defendant company, these papers being printed as Exhibits "A" and "B" of the bill. In the papers signed by him the plaintiff applies to the defendant company for an option to purchase twenty shares of its capital stock at \$20 a share, and provides that \$100 should be paid down and the balance in six months, and agree that in case of failure to meet the payments the option shall be void; and the paper signed by the officers of the company grants the same option to the plaintiff on substantially the same terms. The plaintiff made the cash payment required and gave his note for the balance for six months.

Third.—At the same time and, as the officers of the company understood it, as a part of the same transaction, a policy of insurance was issued to A. Mamaux & Sons, a firm of which the plaintiff was a member, on an elevator described in the policy as belonging to the insured. The regular price for this policy was \$35, but the premium charged to the insured was \$22. The plaintiff says he never knew or heard of this policy, as we understand him, up to the time of the trial; that the firm of A. Mamaux & Sons was not the owner of any elevator, but that the elevator intended in the policy belonged to the Pittsburgh Water Proof Company, and that the policy was taken out by his son, who was connected with that company.

Fourth.—At the same time with these transactions there was some arrangement spoken of between the parties as to a compensation or commission to be paid by the company to the plaintiff as a stockholder, but whether it was shown to the plaintiff in writing or not does not appear. The plaintiff paid his note in September, 1910, and received a certificate for twenty shares of stock in the ordinary form, and with it, as a separate paper, an agreement signed by the president and secretary of the company printed as Exhibit "C" of the bill. The plaintiff in his bill alleges that this paper was delivered to him at the same time as the option, but his testimony, which agrees with the account of the defendant, is that it was sent to him with the stock.

Fifth.—The agreement, Exhibit "C," is dated May 1, 1909, although Mamaux had no connection with the company at that time. It recites that the company, for the advancement of its interests in the State of Pennsylvania and the better protection of its

stockholders and itself, was organizing a committee of share owners who owned "these contracts." The plaintiff then agrees that he will "co-operate with the party of the first part to the extent of his good will and influence in the advancement of the company's interest," and the company is made to agree in consideration of this to allow the plaintiff compensation as follows: "An amount equal to 5 per cent. of the net premium income of the company received from the said State will be divided among the holders of these contracts annually, in cash, for the period of ten years from the date hereof, each member to participate in proportion to the number of shares of the capital stock of the company standing in his name," no member, however, to receive credit on more than 100 shares. It is further agreed that the plaintiff is to have a commission of 15 per cent. on "all new business influenced by him," and a like percentage on every renewal while the business remains in force. The contract is signed by the president and secretary, and the seal of the company is affixed.

Sixth.—It does not appear how many members there were or were to be in the "committee," which was to consist of stockholders holding "these contracts." It does, however, appear that there were stockholders who were not appointed on that committee nor furnished with an agreement to give them a share of the net premiums, and one of these has been made a party defendant to the bill.

Seventh.—Before any payment of the share of net proceeds or of commission was made under this agreement to the plaintiff, the insurance commissioner of the Commonwealth notified the defendant company not to carry out this or any similar contract, as being contrary to the statutes in regard to rebates made by the insurance companies.

Eighth.—It does not appear that the plaintiff ever "co-operated" with the company or influenced any new business for it, except that he spoke about the company to three or four people.

Ninth.—This bill was filed to require the defendant to discover the number of holders of such contracts as Exhibit "C" there are, and for an account of the affairs of the company so as to show what net premium income was received from business in the State of Pennsylvania for the period in question, and for a decree for the payment to the plaintiff of his share in such net premium.

## CONCLUSIONS OF LAW.

First.—We understand it to be conceded by the plaintiff that if the agreement Exhibit "C" was made with him in connection with his taking out a policy of insurance in the company, or in consideration of his doing so, it would be illegal and void as contrary to the Act of May 3, 1909, P. L. 405. The delivery to the plaintiff as above stated of a contract signed May 1, 1909, although delivered more than a year afterwards, is, perhaps, to be explained by the date of this act. The plaintiff contends that there is no sufficient evidence to show that he received the agreement in connection with the policy of insurance. While the circumstances mentioned above point strongly to the contrary, we are not prepared to say that they ought to prevail over the defendant's positive statement. We do not deem it material to pass upon this matter, either as a matter of law or of fact, as it is our opinion that the case can be properly disposed of on other grounds.

Second.—Treating the case then as one of a sale of stock by the company to a stranger, the question to be determined is whether or not the agreement contained in Exhibit "C" is valid and binding. We are of opinion that it is not, for several reasons.

Third.—The transaction in question, if the agreement is to be sustained, amounts to a sale of the capital stock of the company for less than par, or a gift of it to the plaintiff, or a gift of it in addition to a large sum of money payable during a long period to the plaintiff. While the plaintiff is apparently paying \$20 a share for the stock, the par value of which is \$10, it may easily be the case that 5 per cent. of the net premium received in Pennsylvania would be a vastly larger amount and that the plaintiff's share of it would be a much greater amount than \$20 a share. In fact, for anything that appears the plaintiff may be the only member of the "committee" and be entitled to 5 per cent. of the whole of the net premiums received by the company in Pennsylvania. Whatever he might get on this contract as his share of the net premiums would be nothing more or less than a rebate on the price of the stock, his "co-operation" with the company being purely an illusory consideration.

Fourth.—We are further of opinion that as the contract in

question was signed only by the president and secretary of the company and does not appear to have been authorized by the company itself or its directors or stockholders, it is not binding on the company. The making of a contract to dispose of a large part of the net premiums of the company in such an unusual way is certainly not within the ordinary powers of the president and secretary of such a corporation.

Fifth.—Even if the company had attempted to make the contract, it would seem to be *ultra vires*, and would be illegal as an attempt on the part of the company to make an arbitrary distinction between stockholders of the same class as to the profits to be received by them from the company.

Sixth.—It further seems very doubtful, to say the least, whether the contract is sufficiently definite to be capable of execution even if it were otherwise valid. The company is authorized to, and presumably did do business elsewhere than in Pennsylvania. The contract is that 5 per cent. "of the net premium income received from the said State," shall be divided annually. If by "net premium income" is mean the amount of premiums received by the company less the commissions of agents and the expense of collecting it, the agreement would be grossly illegal as a diversion of the funds of the company out of which its losses are to be paid, and we do not understand that this is claimed to be the meaning of the term. If the net premium income received from the State of Pennsylvania means, as we understand the plaintiff to claim, the net profits of the company in each year arising out of business done in the State of Pennsylvania, this would certainly be difficult, if not impossible, to arrive at, as the premiums collected in Pennsylvania were to be used along with all the premiums collected by the company as a joint fund to pay all its losses.

Seventh.—We are, therefore, of opinion that the contract set up by the plaintiff is illegal and void, and that, therefore, the plaintiff is not entitled to an account as prayed for.

The bill is dismissed at the costs of the plaintiff.



## LUTZ V. WEBSTER, ET AL.

*By-law requiring four-fifths of stock for a quorum—Rights of majority—Powers of minority—Annual election—Act of April 29, 1874, P. L. 73, Sec. 5.*

An annual election is a necessity of corporate existence and is required by Section 5 of the Corporation Act of April 29, 1874, P. L. 73. A by-law which provides that four-fifths of the stock should be represented at any meeting to constitute a quorum is void because it is in derogation of the power to hold an election and of the right of the majority in interest of the corporation to control its affairs.

Where a minority in interest of the stockholders, which controls the board of directors of the corporation is purposely absent from the annual meeting, thereby preventing a quorum and preventing the election of a new board, the court will order an election and will appoint a master to conduct the same.

Exceptions to findings of fact and conclusions of law. C. P. No. 5, Philadelphia County, Dec. Term 1913, No. 4562. In equity.

*Roberts, Montgomery & McKeehan*, for complainant.

*Johnson & Gilkyson*, for respondent.

STAABE, J., October 28, 1914.

In this case the complainant, William H. Lutz, is the holder of 799 shares, of the par value of \$50 each, aggregating at par \$39,950, of the stock of the Lutz-Webster Engineering Company, Incorporated, a corporation of the State of Pennsylvania; the respondent, Paul W. Webster, is the owner of 299 shares, aggregating at par \$14,950, of the stock; one Joseph Hill Brinton is the holder of two shares of said stock of a like par value, aggregating at par \$100; Florence F. Webster is the holder of 100 shares of said stock, aggregating at par \$5,000, which holdings constitute the total amount of stock of the corporation.

The respondent, Paul W. Webster, at a meeting of the board of directors of the corporation, held September 25, 1912, was elected president; Joseph Hill Brinton, vice-president, and William H. Lutz, the complainant, secretary and treasurer of the corporation. The three officers named constituted the board of directors of the corporation.

These named directors have never been re-elected, nor have other directors been elected in their places. No meeting of the board of directors has been held since September 25, 1912, on which date the officers named were elected.

Section 4, Article 1, of the by-laws of the corporation provides: "Section 4. Four-fifths of the stock of the company must be represented in person or by proxy to constitute a quorum. Only those shall be entitled to vote who appear as stockholders upon the record of the company. If a quorum fail to attend at the time and place of meeting, those who do attend may adjourn from time to time until the meeting shall be regularly constituted."

Section 2, Article 1, of the by-laws provides that the annual meeting of the stockholders shall be held on the fourth Monday of January of each year, at the principal office of the company, for the election of the board of directors for the ensuing year.

It was admitted that, in accordance with this provision of the by-laws, notice had been sent to all stockholders of the corporation of a meeting to be held at the office of the company on the fourth Monday of January, 1914, namely, January 26, 1914, at 4 o'clock p. m. At this meeting neither of respondents, Paul W. Webster and Joseph Hill Brinton, was present either in person or by proxy. The complainant, the secretary and treasurer, was present, and, in the absence of a quorum, the meeting was adjourned until further notice.

It appeared from the evidence that the absence of Paul W. Webster was intentional, and the effect of his intentional absence was to obstruct the corporate business of the company. It further appeared the said Paul W. Webster had declined to be present at a meeting of the stockholders or to call it to order and act as temporary chairman of such a meeting, as provided by the by-laws, or to enforce the provisions of the by-laws directing that an annual meeting and the election of a board of directors should be held.

It was further averred the effect of this combination was to perpetuate the management of the corporation by a minority in interest of the stockholders, to the exclusion of the majority, contrary to the intent of the laws of Pennsylvania and the by-laws of the company.

The complainant prayed: (1) That a decree be entered by the court, directing that an election of directors by the stockholders of the corporation be held at a time and place to be fixed by a decree of the court, and to be conducted by a master appointed for that purpose by the court. (2) That an injunction be issued, preliminary until hearing and permanent thereafter, restraining the respondents, Paul W. Webster and Joseph Hill Brinton, from interfering or in any way dealing with the property of the company, and from performing or attempting to perform any acts as directors or officers of the said corporation. (3) General relief.

At the trial of the case, the respondent, Webster, endeavored to prove an agreement between himself and the complainant, Lutz, which had been prepared, but before either of them had signed it there was a verbal agreement between them that Webster should be elected president of the company at \$75 a week and Lutz secretary and treasurer at the same salary, each to hold office for such period of time as the parties should remain associated together as stockholders of the company, and that this oral agreement was the inducement for the respondent, Webster, entering into the written agreement. The trial judge held that the testimony submitted was insufficient to change the written agreement or to justify the court in incorporating it in the written agreement. The court finds as a fact that there was no oral agreement that the parties should hold their respective positions as long as they owned the stock. This conclusion of the trial judge was undoubtedly correct.

The by-law providing that a quorum for the transaction of business must consist of the holders of four-fifths of the capital stock of the corporation is one which is in derogation of the power inherent in all corporations to hold an election. An annual election is a necessity of corporate existence, and is among the implied powers granted to every corporation, whether or not expressed in its charter. When individuals become members of a corporation, there is undoubtedly an implied agreement that a majority of the stockholders at a regular and stated meeting by their vote shall control the funds of the company, if such control is exercised in conformity to their chartered rights. Each stockholder undoubtedly surrenders the absolute personal control

which he has to the joint action of others with himself in relation to the amount of property which he chooses to invest. *Carpenter v. Burden*, 2 Pars. 24.

Unanimity in the government of a corporation is not required, unless its charter so provides. It is one of the consequences of becoming a stockholder of a corporation that the will of the majority shall govern, unless the fundamental articles provide otherwise. *McKean v. Biddle*, 181 Pa. 361.

The trial judge is undoubtedly correct in finding "that the business of the corporation cannot be carried on in accordance with the by-laws, unless annual meetings of the stockholders are held." Section 5 of the Corporation Act of April 29, 1874, P. L. 73, provides, *inter alia*: "The directors or trustees shall be chosen annually by the stockholders or members, at the time fixed by the by-laws." Annual meetings are required for the election of officers as well as for the proper government and control of the corporation, not only in its relations to its stockholders and those dealing with it, but in its relations to the Commonwealth, whose laws have created the corporation. Such annual meetings being a necessity, a by-law which enables the holders of one-fifth of the stock to block the entire business of the corporation "must give way or else the other by-laws will be nugatory." It is apparent, not only from the by-laws of this corporation but from the corporation laws of the Commonwealth, that it is essential that annual meetings of the stockholders should be held, that the directors should be elected at this meeting, and that the directors should meet and elect officers for each year of the corporate existence of the company.

The conclusion of the court that the by-laws requiring four-fifths of the stock to make a quorum will have to give way under the circumstances existing in the Lutz-Webster Engineering Company, respondent, is one of necessity for the continuance of its corporate existence. The minority interest undoubtedly is entitled to have ample notice of the time and place of meeting, and the suggestion of the trial judge that the time for such meeting should be one convenient for the attendance of the respondent, Paul W. Webster, is a proper one and will undoubtedly be carried out. Under the circumstances, the order of the court that such meeting should be held under the direction of the court, and that

a master should be appointed to conduct the election ordered by the court, must be carried into effect.

The exceptions of the respondents to the decree entered by the court are overruled.

BLAIR, TRUSTEE, ASSIGNEE, v. THE KINGSTON MANUFACTURING CO., ET AL.

*Wage claims against stockholders—Pleadings—Sufficiency of statement—Act of April 29, 1874, P. L. 73, Secs. 14 and 15, and May 25, 1887, P. L. 271.*

In an action by a trustee for several wage claimants against the stockholders of a corporation under Sections 14 and 15 of the Act of April 29, 1874, P. L. 73, a demurrer to the statement was filed.

*Held:* 1. The designation "R. J. Blair, Trustee, Assignee of James Scureman et al." is sufficiently indicative of the capacity in which the plaintiff sues.

2. Where such an action is brought in the name of the assignee the statement must contain copies of the assignments made. The right to recover rests not only upon the original claims but also upon the assignments of them and brings the case within the Procedure Act of May 25, 1887, P. L. 271.

3. The statement in such action must set forth the kind of labor performed by the claimants, the amount of stock held by each of the defendants, and that the claims arose within six months prior to the institution of the suit.

Demurrer to statement. No. 64, May Term, 1913. C. P. Luzerne County.

*J. R. Scouton*, for plaintiffs.

*H. W. Dunning*, for defendants.

FULLER, P. J.

By this single action the plaintiff, suing in his own name. "trustee, assignee" of certain thirteen persons having claims for labor, seeks to recover the aggregate amount of those claims from the employer corporation and from certain stockholders thereof, the right of recovery against the stockholders being based upon Sections 14 and 15 of the Act of April 29, 1874, P. L. 73.

The suggested grounds of demurrer are: "1. That the capacity in which plaintiff is suing does not appear from the statement. 2. That the alleged assignments of March 29, 1913, under which plaintiff claims, are not attached and made a part of the

statement. 3. That plaintiff's statement on its face does not comply with the provisions of the act upon which plaintiff bases his right to recovery."

While the statement bears the appearance of careful preparation, we think that the demurrer, in part at least, is well taken. The first ground is unsubstantial and cannot be sustained.

It is of no consequence to the defendants who the beneficiaries are, inasmuch as the defense, if there be any, will stand good against the claims, regardless of beneficial ownership.

Furthermore, the form of the designation, "R. J. Blair, Trustee, Assignee of James Scureman, et al," is entirely consistent with the construction that the plaintiff is not only assignee, but also trustee of the same individuals, on the fair inference which can be drawn without difficulty, that for the convenience of a single action, the claims have been assigned to him merely as trustee for the assignors themselves, to whom he will be accountable after recovery.

The second ground, however, is sustained because the plaintiff is not suing in the name of the assignors to his use, but in his own name, and his right to recover in that form is founded, not only upon the original claims, but upon the assignment of them, thus bringing the case within the requirement of the Procedure Act of May 25, 1887, P. L. 271, that the statement "shall be accompanied by copies of all notes, contracts, etc., upon which plaintiff's claim is founded."

The third ground also must be sustained, because the statement (a) does not show the kind of labor performed by any one of the assignors; (b) does not show, nor explain the failure to show, the amount of stock of the corporation held by each of the stockholders, defendants, which limits their respective legal liability; (c) embraces labor performed more than six months prior to institution of the suit on April 24, 1912, although the law expressly provides that "no stockholder shall be personally liable for payment of any debt contracted by any such corporation, unless suit for the collection of the same shall be brought against such stockholder or stockholders within six months after such debt shall have become due;" and the statement does not disclose the dates when due nor the amount recoverable under the law.

The demurrer is therefore sustained, with permission, however, to file an amended statement.

BLAIR, TRUSTEE, ASSINGER, v. KINGSTON MANUFACTURING CO.,  
ET AL.

*Wage claims against stockholders of a corporation—Assignment to trustee—Act of April 29, 1874, P. L. 73, Secs. 14 and 15.*

Where, in order to avoid a multiplicity of suits, a number of wage claims against the stockholders of a corporation were assigned to a trustee who averred in his statement that he "holds said claims as trustee for the assignors themselves, to whom he will be accountable after recovery," a demurrer was filed setting forth that the action of a wage claimant is founded upon a tort or a penalty and is therefore not assignable.

*Held:* Such claims are based upon an additional personal monetary duty imposed upon stockholders in favor of mechanics and laborers out of consideration for the meritorious character of their claims, and not upon a tort or a penalty, and the ground of demurrer amounting to a mere technicality, it is overruled.

Demurrer to amended statement. C. P. Luzerne County. No. 64, May Term, 1913.

*J. R. Scouton*, for plaintiffs.

*H. W. Dunning*, and *G. J. Clark*, for defendants.

FULLER, P. J., September 8, 1914.

The suit is based upon Sections 14 and 15, Act of April 29, 1874, P. L. 73, giving right of action for labor claims against stockholders of corporations.

The ground of demurrer now urged is that such a right is non-assignable and therefore that the action cannot be maintained by the plaintiff suing as an assignee.

A former demurrer to the original declaration on other grounds, which the court overruled, did not suggest this ground at all, which has only been urged against the amended declaration and has been overruled in a careful opinion by a judge of this court.

We are now asked upon a re-argument of the question to revise this opinion.

The premise of the argument is that the action is in substance founded upon a tort or penalty, and if this premise be conceded the claimed conclusion might be inevitable, but we cannot concede the premise.

In its support *Katch v. Benton Coal Company*, 19 Superior Ct. 476, and *Lane's Appeal*, 105 Pa. 49, are cited as decisive. Neither of them directly rule the question at bar, but in *Lane's Appeal* it was said: "The special, limited, and restricted sources of liability established by these acts (acts imposing liability upon stockholders) are in the nature of penal obligations for derelictions of duty or additional personal monetary duties imposed upon stockholders in favor of laborers, mechanics and materialmen, out of consideration for the meritorious character of their claims;" and in *Katch v. Benton Coal Company* this was cited as authority for the proposition that a liability of this character is not contractual within the jurisdiction of a justice under the Act of 1810.

We might concede on the strength of this authority that the liability is not precisely contractual, without conceding, however, that it is tortious or penal in any proper sense.

The language of the statute seems to rebut any such conclusion, imposing, as it does, direct and immediate liability upon the stockholders, while reserving to them the equitable right of recourse as in cases of suretyship, unlike cases of tort.

We stand upon the alternative suggested in the citations, that the liability "is an additional personal monetary duty imposed upon stockholders in favor of mechanics and laborers out of consideration for the meritorious character of their claims."

The able counsel for defendants has bestowed a great deal of learning and ingenuity upon his contention, but we are not convinced of its correctness, and we therefore throw the benefit of any possible doubt against the demurrer.

To this conclusion we are also moved by express averment in the statement that the assignments have not changed the actual ownership of the claims, but were made to the plaintiff "as trustee for the purpose of avoiding a multiplicity of suits and that the plaintiff holds said claims as trustee for the assignors themselves, to whom he will be accountable after recovery;" so that the position of the defendants on this matter is really reduced to the bald-est possible technicality.

Accordingly the demurrer is overruled, with further extension of time for filing affidavit of defense until September 21, 1914.



## MILWAUKEE WESTERN MALT CO. v. MELLET.

*Foreign corporations—Registration—"Doing business"—Interference by state with interstate commerce—Construction of statutes—Precedents—Act of June 8, 1911, P. L. 710.*

The taking of orders for goods by traveling salesmen in this State or the selling of goods by sample is not "doing business" within the meaning of the Act of June 8, 1911, P. L. 710, and an unregistered foreign corporation selling goods in this manner to persons here may sue upon its contracts without payment of the license fee provided for by section 4 of the said act. Any other interpretation of the act would bring it into conflict with that clause of the Federal Constitution which gives congress the power to control interstate commerce.

The said Act of 1911 repeals the Act of April 22, 1874, P. L. 108, which formerly regulated the registration of foreign corporations, but the decisions under the latter act as to what constitutes "doing business" must to a large extent control the decisions under the present act.

Motion for new trial. C. P. Schuylkill County. No. 340, Jan. Term, 1913.

*J. B. Reilly*, for rule.

*C. E. Berger*, contra.

Koch, J., December 21, 1914.

The plaintiff is a corporation existing by virtue of the laws of the State of Wisconsin, and is engaged in business in the City of Milwaukee. It is not registered for doing business in this State. The defendant lives in Shenandoah in this county. On June 7, 1912, he met at Shenandoah the plaintiff's agent resident in New York, and entered into a written contract with the said agent for purchasing "two cars choice grade western malt." Price one dollar and thirty-two cents per screened bushel F. O. B. Shenandoah, Pa., or Pottsville, Pa., and the "malt to be shipped in bags in gradual monthly shipments between now and August 7, 1912. Billing directions to follow." It is not necessary for the purpose of this opinion, to quote more from the contract.

The contract was signed by the said agent and also by Mr. Mellet at Shenandoah, and was shortly thereafter ratified by the plaintiff. Very soon after the contract was made, the price of malt began to fall and it continued to fall, and the defendant

would give no billing directions, although repeatedly requested by the plaintiff so to do, and finally the plaintiff sold the malt to another party at Milwaukee and brought this suit to recover the difference between the price received and the price that the defendant had agreed to pay allowing, however, for the variance between the prices at Milwaukee and Shenandoah. The verdict of the jury is in favor of the plaintiff, for the sum of nineteen hundred and eight dollars and twenty-nine cents.

We are asked to direct a verdict in favor of the defendant, because of the provisions of an act in this Commonwealth, entitled, "An act to regulate the doing of business in this Commonwealth by foreign corporations; the registration thereof and service of the process thereon, and providing punishment and penalties for the violation of its provisions, and repealing previous legislation on the subject; approved the 8th day of June, 1911, P. L. 710.

Under the provisions of said act, "Every such foreign corporation, before doing business in this Commonwealth shall appoint in writing the secretary of the commonwealth, and his successor in office to be its true and lawful attorney and authorized agent, upon whom all lawful processes in any action of proceeding against it may be served." A fee of ten dollars is fixed for filing the power of attorney. It is further provided, "That the failure of any such corporation to file the power of attorney and statement aforesaid, with the secretary of the commonwealth, shall not impair or affect the validity of any contract with such corporation, and actions or proceedings at law or in equity may be instituted and maintained on such contract; but no such action shall be instituted or recovery had by any such corporation, on any such contract, either expressed or implied, in any of the courts of this Commonwealth, or before any justice of the peace or magistrate thereof, on any cause of action arising prior to the filing of the power of attorney and statement provided for in section two of this act, it shall pay to the secretary of the commonwealth, for the use of the Commonwealth, a license fee or fine of two hundred and fifty dollars.

When the plaintiff had put in its evidence, the defendant moved for a nonsuit, which was disallowed. To give a new trial now would be to meet the same question, which would have to be met

by the same answer. The facts in the case do not make out "the doing of business in this Commonwealth" or "doing any business in this Commonwealth," within the meaning of the Act of 1911. This act repeals "An act to prohibit foreign corporations from doing business in Pennsylvania without having known places of business and authorized agents," approved the 22d day of April, 1874, P. L. 108, but the decisions under that act, as to what constitutes "doing business," must to a large extent control the decisions under the present act, and we think reference need be had only to a few decisions under the former statute, in order to understand the present statute in respect of the words quoted above.

In the case of the Blakslee Manufacturing Co. v. Robert W. Hilton, et al., 5 Superior Ct. 180, the plaintiff was a corporation organized and doing business under the laws of the State of Illinois. The defendant had "ordered from the plaintiff company, through its agent, Eugene McElwaine, located at the City of Bradford, County of McKean, in this State, one steam pump, which was shipped to the defendant." The defendant sought to defeat recovery upon several grounds, one of which was that the plaintiffs had not complied with the provisions of said Act of 1874, but failed, the Superior Court saying: "The words 'doing any business' as used in the act, should not be construed to mean taking orders or making sales by sample, by agents coming into our State from another, for that purpose. To hold otherwise would make the act offend against the Constitution of the United States, as imposing unlawful restrictions on interstate commerce: Cooper Mfg. Co. v. Ferguson, 113 U. S. 727; Robbins v. Taxing District of Shelby County, 120 U. S. 489; Brennan v. City of Titusville, 153 U. S. 289; Harmon v. City of Chicago, 147 U. S. 396 (Lawyers' Ed., Book 37, p. 216); Pembina Con. Silver Mining and Milling Co. v. Pennsylvania, 125 U. S. 181; Coit v. Sutton, 102 Mich. 324; Toledo Commercial Co. v. Glenn Mfg. Co., 11 Ohio Cir. Ct. R. 153."

In the case of Mearshon v. Pottsville Lumber Co., 187 Pa. 12, the plaintiff was a Michigan corporation. In the syllabus it is stated: "A corporation of one state may send its agents to another to solicit orders for its goods, and contract for the sale thereof, without being embarrassed or obstructed by the State

requirements as to taking out licenses, filing certificates, or establishing resident agencies.

"A state which imposes limitations upon the power of a corporation created under the laws of another state to make contracts within the said state for the carrying on commerce between the states, violates that clause of the Constitution which confers upon congress the exclusive right to regulate commerce."

Mr. Justice GREEN (inter alia) said, "The plaintiff is a corporation duly incorporated in the State of Michigan. Its manufacturing operations are there conducted; its capital is there invested. None of it is invested here. The order for the goods in question was given to its salesman and agent in Philadelphia, and by him sent to the plaintiff, who executed the order in Michigan. Under all the decisions this is not a doing of business in this state which makes it necessary to comply with the provisions of the Act of 1874, and hence the defense made on that ground has no merit."

In Vol. 23, Advance Sheets of the District Reports, December 15, 1914, there will be found, on page one of the Legal Intelligence therewith printed, a long reference to the case of Sioux Remedy Co. v. F. M. and D. C. Cope, decided by the Supreme Court of the United States on the 30th of November, 1914. The case arose in the Circuit Court of Turner County, South Dakota. It involved the same question that we have here before us. Mr. Justice VAN DEVANTER says in his opinion, "We think that when a corporation goes into a state other than that of its origin, to collect, according to the usual and prevailing methods, the purchase price of merchandise which it has lawfully sold therein in interstate commerce, it is there for a legal purpose of such commerce, and that the state cannot, consistently with the limitation arising from the commerce clause, obstruct or hamper the attainment of that purpose. If it were otherwise, the purpose of the Constitution to secure and maintain the freedom of commerce, by whomsoever conducted, could be largely thwarted by the states, and the commerce itself seriously crippled." The plaintiff was an Iowa corporation and had sued to recover eighty dollars for merchandise sold in South Dakota, but its right to sue in the premises was decided adversely by the South Dakota court and the Supreme Court of the United States reversed the decision

and remanded the cause for further proceedings not inconsistent with the opinion of the Supreme Court.

The reasons in support of the motion are not sufficient and the verdict must remain undisturbed.

And now, December 21, 1914, the motion in arrest of judgment and for a new trial is overruled; and it is hereby ordered that, upon payment of the jury fee, judgment be entered on the verdict of the jury, in favor of the plaintiff and against the defendant.

**BANK OF HAMILTON V. TRESCHER.**

*Foreign corporations not registered—Right to sue—Pleadings—  
Sufficiency of statement—Plea in abatement—Constitution  
Article XVI, Section 5—Act of June 8, 1911, P. L. 710.*

Under the operation of the principle of comity between the states, a corporation created in one state can sue in the courts of another state, the same as a domestic corporation can, unless prohibited by legislation of the state in which it attempts to sue. Independent of such legislation a foreign corporation has the same right as a natural person who is a citizen of a foreign sovereignty to sue in the courts of this State.

Article XVI, Section 5, of the Constitution, and the Act of June 8, 1911, P. L. 710, prohibit the doing of business in this State by a foreign corporation without the designation of an address here, the appointment of an agent, and registration, but they do not in any way affect the right to sue upon contracts which were made in another jurisdiction and did not arise in connection with the doing of business here.

In an action brought by a foreign corporation to recover on a contract not connected with the doing of business in this State, it is not incumbent on the plaintiff to show that it has registered here, and a plea in abatement setting forth that the plaintiff is not entitled to sue in this State will not be sustained unless it alleges that the contract was made while the corporation was engaged in doing business here.

Plea in abatement. C. P. Westmoreland County. No. 588,  
Feb. Term, 1914.

*Marker & Hollingsworth*, for plaintiff.

*James L. Kennedy*, for defendant.

McCONNELL, J.

A plea in abatement has been filed. It has been argued and submitted to the court by counsel on both sides as a question of

law for the court, to be determined solely from what appears on the record. The plea alleges (1) that neither the plaintiff nor the use-plaintiff is a legal entity in the State of Pennsylvania. (2) That if the plaintiff is a foreign corporation, it is incumbent on it to show as an essential part of its case that it has acquired the right to sue in the courts of this State, through a compliance with the law by registration, appointment of an agent, etc., in the office of the secretary of the commonwealth.

The provision in the Constitution and in the Act of Assembly is a provision with respect to the right of a foreign corporation "*to do business*" in this State—and not specifically with respect to its right to maintain an action in the courts of the State. Independent of these provisions, a foreign corporation had the same right as a natural person, who was a citizen of some other sovereignty, had to sue in the courts of this State. "Although a corporation is a mere creature of the law, the fact that a particular corporation claiming as plaintiff in the courts of a state has not been created by the laws of that state does not contravene its legal entity there. A foreign corporation may have a standing as plaintiff, very much as a natural person who is an alien." 30 Cyc. 24. "That a foreign corporation can contract with a citizen of this State, and enforce the contract by suit in the courts has never been controverted. *Bank of Augusta v. Earle*, 13 Pet. 519. By the common law, alien friends could always sue, and there is no distinction in this respect between natural and artificial persons." *Leasure v. Union Mutual Life Ins. Co.*, 9 Pa. 493. "It may be laid down as a general principle that whenever a foreign corporation has, within the domestic jurisdiction, the power to become the obligee in a given contract, or to acquire or own real or personal property, it has the same right of action, at law and in equity, to enforce the performance of such contract, or recover damages for its breach, or to recover possession of such property, or prevent or recover for injuries thereto which is afforded by the laws of such state to domestic persons or corporations." 19 Cyc. 1314. "The right of a corporation to sue in the courts of another state or country is not an absolute right, but rests upon the comity of states. Under the operation of this principle of comity, a corporation created in one state can sue in the courts of another state, the same as a domestic corporation can, *unless*

*prohibited by legislation of the state in which it attempts to sue."*  
Ibid. 1315.

To what extent then do the constitutional and legislative provisions take away this common law right to sue in our courts? Article XVI, Section 5 of the Constitution, says: "No foreign corporation shall *do any business in this State*, without having one or more known places of business and an authorized agent or agents in the same, upon whom process may be served." The thing prohibited is clearly not the bringing of suits in the courts of this State, but the "*doing business*" within the State without a compliance with the provision about an agent, etc. The reports show many cases in which there have been adjudged to be proper legal occasion for bringing suits in this State, while the basis of the action did not arise when the plaintiffs were engaged in "*doing business*" therein. "A settlement of accounts had with a foreign corporation for goods sold at his place of business in New Jersey, even if made in Pennsylvania, is not such 'doing business' in Pennsylvania as will bring the company within this section." *New Jersey Steel Tube Co. v. Riehl*, 9 Sup. 220. "A foreign corporation may enter into an agreement with a local storekeeper, by which he agrees to buy its goods and it agrees to sell to no one else in that locality and appoints him 'local agent' for the sale of its goods, and not thereby be 'doing business' in the State." *Cosmopolitan Fashion Co. v. J. C. Brobst*, 15 York 8. "Only corporations having established offices, or transferring part of their capital to this State and engaging in their ordinary business in the State are subject to the obligation to register." *Hall's Safe Co. v. Walenk*, 42 Sup. 576.

The Act of 1911, passed to prescribe a mode of procedure to make effective the foregoing constitutional provision has only the same scope of prohibition. To run counter to the foregoing prohibition the plaintiff must be "*doing business*" in Pennsylvania, a thing that this plea does not allege. For aught that appears in the plea, the contract sued on may not at all have been incidental to any prohibited "*doing of business*" in this State. If not, there is no necessity for registration in order that the plaintiff have the right to sue here. The contract is dated at "Brantford, Ontario," and the defendant is to pay there. A foreign corporation making a contract with a citizen of Pennsylvania in Canada is entitled to

enforce it there, and may also enforce it here. The corporation is a legal entity there, and, for the enforcement of the same contract in the courts of this State, it will be considered a legal entity here,—especially as against a defendant who has himself authorized its existence, by contracting in writing with it, and who also has already received the benefit of the contract. One seeking to pay a contract obligation by an allegation that the other party had no legal authority to make it—and this after he himself has obtained and enjoyed the right bargained for—should make it clear that the contract would be in contravention of the law. *Rice & Hutchins Co. v. Carsman*, 15 Luz. L. Reg. 435; *Tube Co. v. Riehl*, 9 Sup. 220. In *Diamond Match Co. v. Roerer*, 13 N. E. 419, the New York Court of Appeals said: "A defendant who has violated a contract with a corporation, after he has received the benefits of the contract, is not in a position to complain that the contract is ultra vires of such corporation." But the substance of this plea is that there is no plaintiff on the record, whose existence will be recognized by the courts of this State, because the nominal plaintiff is not here a legal entity. If the contract is enforceable in Ontario, it is enforceable here. If for its enforcement in Ontario, the plaintiff is a legal entity, for the same purpose, it is a legal entity here, and the courts of this State, following the example of the defendant himself, will recognize it as such,—it not appearing by the plea that the obligation arose as an intrinsic factor in the doing of such business as the Constitution and statute forbid to be done without registration. Of course, it is no incumbent on the plaintiff to show affirmatively by its pleading that it has registered, if the transaction is not of such character as to be "doing business" in this state. The plea must be adequate to show that the plaintiff is not entitled to sue in the courts of this State. It does not do that. Therefore, it does not appear that plaintiff has no right to maintain this action.

Upon due consideration, the plea in abatement is overruled, and the defendant is directed to answer over, within twenty days from this date.



COMMONWEALTH, EX REL., ATTORNEY GENERAL, V. GUARDIAN  
FIRE INSURANCE COMPANY.

*Insurance companies—Rights of stockholders—Dissolution—Dis-  
tribution by receiver of insolvent corporation.*

A stockholder of a company who does not attend the meeting of stockholders which approves a merger of the said company with another and who refused to come into the new corporation has a claim against the new corporation for the value of his stock at the time of the merger. However, where such claim is not asserted until the new corporation has been dissolved and its assets placed in the hands of a receiver for the benefit of creditors, it has no priority over the claims of other creditors.

Where agents of an insolvent insurance company present to the receiver claims for return premiums on a number of policies in the company which have been assigned to them, the receiver may deduct from the amount of said return premiums the amount of unearned commissions and of any agency balance due the company.

On exceptions to Auditors' Report. C. P. Dauphin County.  
No. 23, Commonwealth Docket, 1909.

McCARRELL, J., Dec. 23, 1914.

We will consider the claims of the several exceptants according to their nature.

D. H. Rapp alleges that his claim should have been preferred to that of the other creditors and that he should have been allowed \$12.48 for each share of stock held by him in the Conestoga Fire Insurance Company, which was merged with the Armenia Company into the corporation now known as the Guardian Fire Insurance Company. The testimony indicates that the auditors have allowed the full value of the stock as shown by the evidence at the time of the merger. The appraisement of \$12.48 per share was evidently made in ignorance of the exact conditions existing at the time and the revised valuation allowed by the auditors was made upon full knowledge of the conditions actually existing at the time of the merger. The auditors have, in our opinion, properly refused to allow preference to this claim. The merger took place in April, 1906. We must assume that notice was duly given to Mr. Rapp and all other stockholders of the meeting when the question of merger would be voted upon. Mr. Rapp did not choose to attend the meeting and beyond filing

a bill in equity in the courts of Lancaster County, which was dismissed upon demurrer, he does not seem to have done anything with respect to his claim until he submitted his proofs to the auditors making the present distribution. This was long after the Guardian Fire Insurance Company had been dissolved and its assets turned over to the receiver for the benefit of creditors. If Mr. Rapp had acted promptly upon receipt of the notice of the meeting called to consider the question of merger, and had promptly after said meeting filed a bill in equity to restrain the consummation of the merger, he might have obtained an order requiring his claim to be paid or secured before the merger was effected. This is the course pursued by the plaintiff in *Lauman v. Lebanon Valley R. R. Co.*, 30 Pa. 42. This, however, he did not do, and such remedy in equity as was sought in that case could not now be secured. The auditors have dealt quite generously with this exceptant in allowing him to participate with other creditors in the distribution of the assets. After so long a delay in attempting to assert any claim Mr. Rapp might perhaps have been precluded from attempting to claim as a creditor of the Guardian Fire Insurance Company. The auditors have decided otherwise, and we see no reason for disturbing their conclusion. The exceptions filed by D. H. Rapp are therefore overruled and dismissed.

The claim of Steinman & Foltz, No. 1748, was based upon their ownership of ten shares of capital stock of the Conestoga Fire Insurance Company. The facts are almost identical with those in the claim of D. H. Rapp, which we have just considered, and for the reasons stated with respect to said claim we now overrule the exceptions filed by Steinman & Foltz to the distribution made by the auditors.

The claim of Jordan-Prichard & Company, Claim No. 1091, is for return premiums upon a number of policies assigned to them. The claimants except to the deduction of the unearned commissions upon these policies. In our opinion these unearned commissions were properly deducted by the auditors, and the exceptions of Jordan-Prichard & Company are therefore overruled and dismissed.

The claims of Umbenhauer & Wanner, Claims Nos. 795, 801, 1028 and 1537; J. A. LaClaire, Claim No. 335; A. V. Landis,

Claim No. 816; and Charles Widmeyer, Claim No. 785, are all for unearned premiums upon policies issued by the defendant company. The claimants severally except to the deduction from the amount of these premiums of the unearned commissions and the agency balance due to the company. We have carefully considered the report of the auditors upon this subject, and have examined the briefs submitted on behalf of the exceptants and the receiver. After careful consideration we are satisfied that the auditors have properly allowed these deductions, and therefore the exceptions filed by these claimants are now overruled and dismissed.

We have considered all the exceptions filed to the report of the auditors, and after such consideration are satisfied that a proper distribution has been reported. We therefore now dismiss all the exceptions and confirm absolutely the auditors' report and direct that distribution be made in accordance therewith.

HENRY M. TRACY, RECEIVER, ETC., v. CITY OF HARRISBURG, ET AL.

*Public service corporations—Exemption of property from local taxation—Lease of property to another public service corporation.*

The exemption of that part of the property of a public service corporation essential to the prosecution of its corporate business, from local taxation, is based upon the ground that such corporations should not be interfered with in the rendering of the service which they owe to the public by having their property essential to such service taken by taxation. If such property is liable to local taxation it must appear by express enactment.

The property does not lose its freedom from local taxation because it is under lease to another company which continues to use it in public service under the lessor's charter rights and franchises.

Bill to enjoin collection of local taxes. C. P. Dauphin Co. No. 519, Equity Docket.

*Simpson, Brown & Williams and Fox & Geyer, for plaintiff.*

*D. S. Seits, City Solicitor, for defendant.*

KUNKEL, P. J., December 21, 1914.

This is a proceeding on the part of the plaintiff to enjoin the City of Harrisburg and Owen M. Copelin, receiver of taxes, from collecting certain city taxes levied upon its property, situate in the City of Harrisburg. The facts are not in controversy, and we find them to be as specifically set forth in the plaintiff's request for findings of fact filed herewith.

#### DISCUSSION.

It is conceded that this case is ruled by *Bell Telephone Company of Pennsylvania v. Harrisburg*, 53 Superior Ct. 458, unless the fact that the plaintiff leased its plant and other property to another corporation distinguishes it from that case. It is well settled that the property of a public service corporation essential to the prosecution of its corporate business is not under general tax legislation liable to local taxation. The ground of the doctrine seems to be that such corporation shall not be interfered with and crippled in the performance of its public functions and of the service which it owes to the public by having its property essential to and used in such service taken by taxation. *County of Erie v. Erie & Western Trans. Co.*, 87 Pa. 434. If this result is to happen the imposition of the tax must appear by express enactment.

We are not able to agree with the contention that the property here sought to be taxed lost its freedom from local taxes because it was under lease to the other telephone company. By the lease the plaintiff turned over the lot and building, together with all its other property, to the latter company, giving that company authority to manage the business and operate the plant and lines at the plaintiff's cost, in the plaintiff's name and by virtue of the plaintiff's charter rights and franchises. The property, however, in no wise ceased but continued to be used for the public service. The lot and building which theretofore constituted the central station still remained such under the management of the other company. The building was used as theretofore in rendering the obligatory service to the public owed by the plaintiff, and no good reason has been suggested why being so used it should be held to have become subject to the payment of local taxes. The considerations which prevail to free it from local taxation applied as well while the plant was operated by the lessee company in

behalf of the plaintiff as while operated by the plaintiff itself. It is the property which is relieved from taxation and its necessity for corporate use excludes it from general tax laws. As was said in *Carbon Iron Co. v. Carbon County*, 39 Pa. 251: "It is not corporations, as such, that we have considered to be exempt from taxation, except so far as expressly imposed; but *public works* held by corporations, together with their necessary appurtenances, as *public works*. 2 Casey 245; 6 Casey 232." Upon consideration of the whole case, we are of the opinion that so much of the plaintiff's building as is essential to and used in the prosecution of its corporate business is not liable for the city taxes sought to be levied against it.

We understand that the city abandons its claim for the taxes assessed against the building for the years 1912 and 1913. Also it is admitted that the taxes for the years 1901 to 1906, both inclusive, were paid. The plaintiff concedes its liability for 440/11616 of the tax from July 1, 1910, to December 31, 1913, inclusive, and 596/11616 of the tax from January 1, 1913, to the date of the filing of this bill, that proportion of the floor space of the building having been used for other than corporate purposes. A decree in accordance with the views herein stated may be prepared by counsel.

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## PUBLIC SERVICE COMMISSION.

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### BOROUGH OF GALLITZIN'S APPLICATION.

*Approval of acquisition and construction of municipal water plant—Protest of company rendering service.*

Where a water company operating in a borough is unable to furnish an adequate supply of water, and the borough, being in urgent need of obtaining such supply, asks the approval of the Commission for the construction of a municipal system, the Commission will not withhold its approval until the borough has agreed to purchase the company's plant.

APPLICATION DOCKET No. 334.

Report and Order of the Commission.

Submitted November 7, 1914.

Decided January 21, 1915.

*W. L. Hibbs*, for petitioner.

*P. J. Little*, for the protestant.

COMMISSIONER WALLACE:

The petition in this case is made by the Borough of Gallitzin, a municipal corporation situate in Cambria County, and having a population of approximately 3,500 inhabitants.

The protest is filed by the Cambria County Water Supply Company. From the papers filed and evidence in this proceeding, we find the following material facts:

The Cambria County Water Supply Company is the lessee from the Gallitzin Water Company of all its property and franchises situate in the Borough of Gallitzin, and the said lessor and lessee have been furnishing water in the said borough for the past twenty-five years. The Cambria County Water Supply Company is unable to furnish an adequate supply of water to meet the demands of the said borough. This inability to furnish an adequate supply of water is admitted by the Cambria County Water Supply Company, and since 1907 said Cambria County Water Supply Company has been endeavoring to secure an additional supply of water, but failed to obtain any additional supply. In order to give the inhabitants of the Borough of Gallitzin sufficient water, the said borough contracted with the Summit Water Supply Company to supply for one year, 50,000 gallons per twenty-four hours, using the distribution system of the Cambria County Water Supply Company to furnish said supply of water to the inhabitants. This contract with the Summit Water Supply Company expires on the 5th day of August, 1915, and by the terms of the said contract the borough must provide, or cause to be provided in a manner independent of the Summit Water Supply Company, a supply of water sufficient in all respects for all its purposes.

From the above statement of facts it is evident that the borough of Gallitzin must obtain, in the near future, an additional supply of water which cannot be furnished by the Cambria County Water Supply Company. The main question raised by the protestant is that a certificate of public convenience granting the borough the right to erect a system of water works, should not be issued by the Commission until the borough had agreed to take

over at a fair valuation the mains and water lines of the protesting company. It no doubt would be very advantageous that a duplication of mains and water lines should not be made in the borough, but, under the circumstances, it does not seem just and proper that the Commission's approval of the right of the borough to construct a system of water works should be withheld until the company and the borough had agreed upon the price to be paid for said property of the water company. This view is strengthened by the fact that the borough, in addition to the approval of this Commission, must also obtain permits from the Commissioner of Health and the Water Supply Commission, and by proper municipal action, secure estimates of the probable cost of the system. It would be illogical to compel the borough to enter into an agreement to purchase any or all of the property of the protesting company before it knew that the proposed supply of water which it hoped to obtain would be approved by the Commissioner of Health and the Water Supply Commission.

The Commission is, therefore, of the opinion that the petition in the case should be approved and a certificate of public convenience issued, leaving the question as to what is a fair valuation for the property of the Cambria County Water Supply Company to be determined, if desired, at a later hearing, and an order will therefore be issued.

#### ORDER.

This case being at issue upon petition and protest filed, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

Now, to-wit, January 21, 1915, it is ordered: That a certificate of public convenience be issued evidencing the Commission's approval of the acquisition and construction of a system of water works by the Borough of Gallitzin in said borough.

By the Commission,

SAMUEL W. PENNYPACKER, *Chairman.*

## BOROUGH OF AVOCA'S PETITION.

*Approval of contracts—Competition—Rates—Service—Jurisdiction of the Commission.*

The borough of Avoca petitioned for the approval of a franchise contract and contract for street lighting made with the Avoca Borough Electric Light Co., a co-partnership recently organized and having no plant or facilities for the performance of the contract. The Scranton Electric Co., which has a complete plant and adequate facilities and has been furnishing similar service in the said borough for some years, protests. The petitioner contends that the rates of the Scranton Electric Co. are unreasonable, that its bid for the contract was higher than that of the Avoca Borough Electric Co. and that it has no lawful authority under its charter and franchises to furnish light, heat or power in the borough.

The evidence shows that the borough has a population of about 4,500, that the protesting company has expended large sums of money in the erection of its plant in the said borough, that its plant is adequate, that the borough cannot support two competing companies, that the new company is without facilities to fulfil its contract, and that it has not given security for the performance of the same.

*Held:* (1) The contract should not be approved. Any complaint concerning the rates or service of the protestant may be presented to the Commission and adjusted by it.

(2) The Commission is not the proper tribunal to determine the authority of the protestant to furnish service to the borough under its charter and franchises when it finds it exercising an accepted right.

## MUNICIPAL CONTRACT DOCKET, Nos. 257, 258.

## Report and Order of the Commission.

Submitted August 14, 1914.

Decided January 21, 1915.

*John R. Reap*, for the Borough of Avoca.*W. L. Pace* and *Robt. W. Archbald*, for Avoca Borough Elec. Co.*F. W. Fleitz* and *W. H. Warring*, for Scranton Electric Co.

## COMMISSIONER PENNYPACKER:

John R. Reap filed a petition setting forth that he is the solicitor for the Borough of Avoca in Luzerne County, Pa., that on March 2, 1914, the council of the borough upon an award after competitive bidding by ordinance approved by the burgess, directed that the borough enter into a contract for lighting its



streets with the Avoca Borough Electric Light Company, a co-partnership, for a period of five years with eighteen arc lamps and thirty-one tungsten lamps, which contract was executed July 30, 1914; that on March 2, 1914, the council passed and the burgess approved an ordinance granting to the same partnership the right, privilege and franchise of furnishing light, heat and power to the borough and persons, associations and corporations therein; that the said co-partnership has executed the said contract and accepted the terms of the franchise ordinance, and prayed the Commission to fix a time for a hearing.

Against the granting of the prayer of this petition the Scranton Electric Company filed a protest setting forth that it is a corporation created April 9, 1907, under the laws of Pennsylvania, for the purpose of supplying light, heat and power by means of electricity; that January 21, 1910, it acquired by purchase the rights, privileges and franchises of the Standard Electric Light, Heat & Power Company of Avoca, together with the property of that company, that the latter company, a Pennsylvania corporation, was incorporated December 15, 1907, for the supply of electricity for light, heat and power in Avoca, and was about that time granted a franchise to enter upon the streets of Avoca with its poles and wires, and entered into a contract with the borough for ten years for the purpose of supplying light, heat and power, and has since continuously occupied them and maintained an equipment to give adequate service at reasonable rates; that a new contract was made in 1908, which expired June 1, 1913; that the protestant maintains a distributing system of upwards of twenty-nine miles of wire with approximately two hundred and seventy-five poles and twenty-six transformers, with meters and other appliances in a good state of efficiency, continuously in operation and entirely adequate to supply all demands, and does so supply them; that the population of Avoca is about forty-six hundred; that there is no public necessity for two electric light companies and not sufficient business for them, and that to permit the entry of another company would work an irreparable injury upon the respondent and confer no benefit on the inhabitants of the borough.

It will be observed at the outset that the application filed, though purporting to come from the Borough of Avoca, is in

reality a petition of an individual who is counsel for the borough, and that all it prays for is that the Commission fix a time for a hearing. A hearing was fixed for September 3, 1914, and therefore, all that is prayed for has already been granted. For the purposes of the determination of what is no doubt the real intention of the application, the Commission will treat the petition as though it had been made by the borough and as though an application to amend by adding a prayer for the approval and the issue of a certificate of public convenience had been granted.

The town of Avoca is a mining town occupying a territory of about a mile square with a population of about four thousand five hundred people, a silk factory and some other small manufacturing establishments and twenty-three licensed saloons. The Scranton Electric Company covers, with its wires, a valley extending from Forest City to Avoca, a distance of about thirty miles, and supplies current to about twenty municipalities. It has a capacity of twenty thousand kilo-watts, but its peak or highest load during the past year was ten thousand kilo-watts, and its ordinary run is from seven to eight thousand kilo-watts. During the last three years it expended upon the improvement and extension of its system about two millions of dollars and to some extent, built it up and replaced the pole line in Avoca. It has in Avoca about twenty-nine miles of wire, two hundred and seventy-five poles, twenty-six transformers and four hundred and twenty customers. Its entire receipts from the borough for a year were fourteen thousand seven hundred and seventy-one dollars (\$14,771.00). Since January 1, 1914, it placed twenty-five poles and ran twenty-seven spans of wire in Avoca connecting with eleven new consumers at an expense of eight hundred and fourteen dollars (\$814.00). Prior to expiration of the old contract on June 1, 1913, this company made a proposition to the borough to supply upon a contract for ten years, arc lights for sixty dollars (\$60.00) and incandescent lights for twenty dollars (\$20.00), and upon a contract for five years, arc lights for sixty-five (\$65.00) dollars and incandescent lights for twenty-two dollars (\$22.00). The borough advertised for bids, whereupon the Avoca Borough Electric Light Company made a bid to supply the light at the rates of fifty-six dollars and fifty cents (\$56.50) for arc lights, and nineteen dollars and fifty cents (\$19.50) for Tungsten lights. The

contract was awarded to this partnership, and it is this contract the Commission is asked to approve.

The Avoca Borough Electric Light Company is a co-partnership, consisting of three individuals, which was organized May 3, 1913. It is not the owner or lessee of any plant. It was testified that the members were willing and able to pay any money required for its future operations, but in the bank there was not "any particular sum" to its credit. At the time the contract was awarded, it gave to the borough a certified check for five hundred dollars (\$500.00) and promised, but did not deliver, a bond in the sum of five thousand dollars (\$5,000.00) security for the performance of the contract. Since the time of the expiration of the old contract, the protestant has been supplying light to the borough upon the terms of that contract. There was testimony to the effect that the supply of light by the protestant was at times imperfect and defective, but this was disputed and there were comparatively few complaints made to the protestant itself. A record of sums deducted for outage from the payments to the protestant was as follows:

1913.		1914.	
July, .....	\$1.10	January, .....	\$0.80
August, .....	1.45	February, .....	None
September, .....	1.45	March, .....	3.05
October, .....	3.78	April, .....	1.38
November, .....	.55	May, .....	3.38
December, .....	2.80	June, .....	None

The vice-president of the Harrisburg Light and Power Company testified that the rates charged by the protestant were reasonable.

Upon this state of facts, the Commission is unable to find that the approval of the proposed contract is "necessary or proper for the service" of the public or is likely to be of permanent benefit to the people of Avoca. This borough is not of sufficient size to sustain two systems of supply profitably. On the one side is a well-established and long maintained system with the facilities and the financial ability to furnish an adequate supply. On the other is a recently organized partnership with no plant, which has offered to supply light, heat and power for a less sum, but so far as the testimony shows, without any of the means which would

enable it to carry out its contract. Any failure on the part of the protestant to furnish a proper supply or any charge of unreasonable rates, if supported, is a matter which can be corrected by the Commission upon its presentation to them.

It is argued for the applicant that under the authority of "Bly vs. Water Company," 197 Pa. State Rep. 80, and "Home Electric Company," 11 Pennsylvania County Court Reports P. 179, the Scranton Electric Company is confined to the borough, town, city or district described in its charter and has no legal right to supply light in Avoca. A like question was considered and appears to have been decided in the case of "Hay vs. Springfield Water Company," 207 Pa. State Rep. 38, where it was held that a water company could acquire the right to supply a district beyond the limits of its own charter, by purchase from another corporation having such rights. In any event, the Commission finds the Scranton Electric Company in the exercise of an accepted right to supply the Borough of Avoca, continued without objection for many years, through a purchase from and merger with the Standard Electric Light, Heat and Power Company, which merger was authorized and permitted by the properly constituted authorities of the State. The Commission is of the opinion that it is not the proper tribunal to determine the legality and legal effect of such merger.

For these reasons it is the opinion of the Commission, that the proposed contract ought not to be approved, and that its application ought to be dismissed. An order will accordingly issue.

#### ORDER.

This case being at issue upon petition and protest filed, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

Now, to-wit, January 21, 1915, it is ordered, That the application in this proceeding be, and the same hereby is, dismissed.

By the Commission,

SAMUEL W. PENNYPACKER, *Chairman.*

**PETITION OF LAKE SHORE & MICHIGAN SOUTHERN RY. CO., ET AL., FOR LEAVE TO CONSOLIDATE WITH OTHER COMPANIES INTO THE NEW YORK CENTRAL R. R. CO.**

**NEW YORK CENTRAL MERGER.**

*Merger of railroad companies—Parallel and competing lines.*

The petitioners ask the approval of the Commission for their merger and consolidation into the New York Central R. R. Co. One of the petitioners, the L. S. & M. S. Ry. Co., owns a majority of the stock of the N. Y., Chi. & St. L. R. R. Co. These two lines, with different termini in other states are parallel to each other for about sixty miles along Lake Erie in this state, but neither of them are parallel nor competing with the lines of the New York Central, with which the L. S. & M. S. Ry. Co. wishes to merge. Minority stockholders of the latter company protest and contend that the proposed merger is in violation of Art. XVII, Sec. 4, of the Constitution of Pennsylvania, which forbids the merger of parallel or competing lines.

It is further objected that by reason of its control of the lines of the Michigan Central, the Western Transit Company, a steamship line on the Great Lakes, and other lines, the consolidated company will control four competing lines from Buffalo to Chicago, and two competing lines from New York to Buffalo.

*Held:* (1) As the lines of the companies to be merged are not competing or parallel, the merger is not forbidden by the constitution. The fact that one of these roads owns the stock of a road parallel to it is no objection to its merger with a third whose lines are not parallel or competing. The purchase and ownership of the stock may have been unlawful, but they do not affect the merger.

(2) The merger and consolidation of continuous lines of railroads has become part of the settled policy of the law of Pennsylvania, and such merger should be approved unless it be shown to be within some prohibition of the law, to work some injustice to vested rights, or to be of disadvantage to the public.

(3) The question of the operation of competing lines between Buffalo and Chicago and between New York and Buffalo, is a matter without this commonwealth and is beyond the jurisdiction of the Commission.

**APPLICATION DOCKET No. 127, 1914.**

**Report and Order of the Commission.**

**Submitted May 20, 1914.**

**Decided December 8, 1914.**

**COMMISSIONER PENNYPACKER:**

The railroad companies which are the petitioners in this appli-

cation are all corporations existing under charters granted in Pennsylvania and other states. They entered into a written agreement April 29, 1914, looking to their consolidation, along with other corporations incorporated in other states, with the New York Central & Hudson River Railroad Company, a corporation of the State of New York, owning a main line extending from the city of New York to the City of Buffalo, with branch lines, having, according to the statement of the application, a capital stock of two hundred and twenty-five millions, five hundred and eighty-one thousand and sixty-six dollars (\$225,581,066), and a bonded indebtedness of three hundred and thirty-six million, one hundred and eleven thousand and four hundred dollars (\$336,111,400).

The corporations presenting the petition are the Lake Shore & Michigan Southern Railway Company, a railroad corporation operating under charters from the states of New York, Pennsylvania, Ohio, Indiana, Michigan, and Illinois, owning a main line of steam railroad extending from Buffalo to Chicago, with a capital stock of fifty million of dollars (\$50,000,000), and a bonded debt of one hundred and fifty million dollars (\$150,000,000); the Geneva Corning and Southern Railroad Company, operating under charters from the States of New York and Pennsylvania, owning a steam railroad extending from Geneva, New York, to Newberry Junction, Pennsylvania, having a capital stock of seven million, three hundred and twenty-five thousand dollars (\$7,325,000), and a bonded debt of three million and five hundred thousand dollars (\$3,500,000); and the Dunkirk, Allegheny Valley & Pittsburgh Railroad Company, a railroad corporation operating under charters from the States of New York and Pennsylvania, owning a steam railroad extending from Dunkirk, New York, to Titusville, Pennsylvania, having a capital stock of one million and three hundred thousand dollars (\$1,300,000), and a bonded debt of two million and nine hundred thousand dollars (\$2,900,000).

The petition sets forth that the railroads proposed to be consolidated "formed continuous or connected but not parallel or competing lines." Objections were filed by certain minority stockholders but after several hearings and the taking of testimony these objections were withdrawn. At this stage of the

proceedings other counsel appeared for other minority stockholders (holding 10 shares of Lake Shore stock, 270 shares of Michigan Central stock and 775 shares of New York Central stock), and filed objections and submitted briefs, and oral argument in support of such objections. The question of the legality and propriety of this consolidation has already been before a number of tribunals. A resolution of the United States Senate of July 10, 1913, instructed the Interstate Commerce Commission to investigate all of the facts and report upon its legality. That Commission made report April 13, 1914, that "neither the consolidation itself nor the exchange of bonds on the basis of increased interest rate indicated incident thereto, would so far as we are advised, offend any Federal statute." [30 I. C. C. 147, 151]. The State of New York Public Service Commission, upon hearing and investigation, concurred in "the opinion of the Interstate Commerce Commission that from the standpoint of economy and operation and facility in financing, the proposed consolidation is warranted," [Case No. 4295, Pub. Ser. Com. of N. Y. Second Dist. Decided Oct. 7, 1914] and issued an order of approval.

Minority stockholders of the Lake Shore and Michigan Southern Railroad Company filed a bill in equity in the district court of New York to restrain the proposed consolidation, and that court in a careful opinion by Grubb, J., refused an injunction.

The merger and consolidation of continuous lines of railroads has become a part of the settled policy of the law of Pennsylvania and a series of statutes provide for the method in which such merger may be effected. The Act of March 22, 1865, Sec. 1, (P. L. 49) provides that: "It shall be lawful for any railroad company or corporation organized under the laws of this Commonwealth and operating a railroad, either in whole within or partly within and partly without this state, under authority of this and any adjoining state to merge and consolidate its capital stock, franchises and property of (into) any other railroad company or companies or corporations organized and operated under the laws of this or any other state whenever the two or more railroads of the companies or corporations as to be consolidated shall or may form a continuous line of railroad with each other or by means of any intervening railroads."

It would seem therefore that the merger ought to be approved by the Commission unless it can be shown to be within some prohibition of the law, to work some injustice to vested rights, or to be of disadvantage to the public. The main contention of the objecting stockholders may be stated as follows:

Sec. 4, of Article XVII of the constitution of this state provides that "No railroad, canal or other corporation, or the lessees, purchasers, or managers of any railroad or canal corporation, shall consolidate the stock, property or franchises of such corporations with, or lease or purchase the works or franchises of, or in any way control any other railroad or canal corporation owning or having under its control a parallel or competing line \* \* \* and the question whether railroads or canals are competing lines shall, when demanded by the party complainant, be decided by a jury as in other civil issues."

The Acts of Assembly of May 13, 1889, (P. L. 205); April 14, 1901, (P. L. 61); May 29, 1901 (P. L. 349); May 31, 1907 (P. L. 313); June 1, 1907 (P. L. 385) and May 3, 1909 (P. L. 408) embody this prohibition in the form of legislation and all follow closely the language of the constitution. In 1882 and in 1887 the Lake Shore & Michigan Southern Railway Company acquired by purchase a majority of the shares of stock of the New York, Chicago and St. Louis Railroad Company, called the "Nickel Plate," and still owns this stock. The Lake Shore runs from Buffalo to Chicago and it seems to be the fact that these two through lines with different termini in other states than Pennsylvania are parallel to each other for about sixty miles along Lake Erie, in this state. It is contended that this fact makes the Lake Shore and Nickel Plate competing and parallel lines, and that since the Lake Shore Company owns the stock of the Nickel Plate Company, and, if the proposed merger be permitted, the Lake Shore will be merged into the New York Central Railroad Company and that railroad company become the owner of the stock, the transaction is within the prohibition of the constitution. Whether lines are competing and parallel lines is a question of both fact and law. Lines running east and west through a country must approach more or less to a parallel. Lines may be for a short part of their route exactly parallel and yet not be competing if they carry different commodities to and



from different communities. It is not altogether certain that the Commission has the power to determine this question. The Constitutional Provision is that "the question whether railroads or canals are \* \* \* competing lines shall, when demanded by the party complainant, be decided by a jury"; and this seems to imply that the tribunal must be one with power to call a jury when the complainant so demands. The Commission has no such power.

It will be also observed that the proposed consolidation is not within the language of the prohibition in the constitution. No corporation here consolidates with or purchases the works or franchises of another corporation owning or controlling a competing or parallel line. The New York Central & Hudson River Railroad does not compete with and is not parallel with, so far as the evidence discloses, either the Lake Shore or the Nickel Plate. It may be that the ownership by the Lake Shore of the stock of the Nickel Plate brings it within the spirit of the prohibition and the intention, but apparently it is not included within the terms used. It is not deemed necessary to reach a conclusion upon either one of these doubtful propositions. Assuming that the purchase of the Nickel Plate stock by the Lake Shore was unlawful, that purchase is in no way affected by the merger. The approval of the merger is not an approval of the purchase, and its legality may be questioned at any time in a proper manner before a proper tribunal. The stock remains in precisely the same situation after such merger as it was before. The merger may be entirely lawful and the purchase may have been entirely unlawful. In fact the merger is based upon a statutory right which exists even though the parties may have participated in many unlawful transactions. To refuse the merger would in no way correct the supposed difficulty. If the Commission were to assume jurisdiction of this question and should find that the stock was held and is now held illegally it ought to compel a disposition of such stock, but it has no such power. In fact the contention appears to be based upon the illogical thought that if a party to a controversy has committed offenses, he may be denied by way of penalty his legal rights. This, however, is not the law. Even a professional burglar may make a valid will.

It is further contended by the objecting stockholders that after merger the New York Central Railroad Company will own and control through a majority holding of the stock the Michigan Central Railroad and the Western Transit Company, a steamship line on the Great Lakes, and so will operate four parallel and competitive lines from Buffalo to Chicago and also two parallel and competitive lines from New York to Buffalo, as well as a trolley line known as the New York State Railways. These are all matters without this Commonwealth and beyond the reach of this Commission.

Another ground of objection is the fact that under the terms of the agreement of consolidation a certain series of bonds bearing four per cent. interest per annum are substituted for a series of bonds bearing three and a half per cent. interest per annum. The New York Central & Hudson River Railroad Company owns four hundred and fifty-two thousand, eight hundred and ninety-two (452,892) shares of the capital stock of the Lake Shore. The agreement provides for the cancellation of this stock. But this stock is held by the Guaranty Trust Company of New York as collateral security for the payment of bonds issued by the owner of the stock to the amount of ninety million, five hundred seventy-eight thousand and four hundred dollars, (\$90,578,400), which bonds bear interest at the rate of three and one-half per cent. per annum and have not matured. It is one of the provisions of these bonds that the Lake Shore shall not be sold, transferred or merged without the approval of the holders of seventy-five per cent. in amount of these bonds. A mortgage was executed by the Lake Shore upon its property and franchises to secure the payment of these bonds. The agreement of merger provides for the refunding of these bonds by the issue in lieu thereof of bonds to the same amount bearing four per cent. interest and to run for eighty years. The bondholders at least to the required number have given their assent to the proposed merger. It may fairly be presumed that the increase of the interest was the inducement which brought about the assent. It is contended by the objecting stockholders that this constitutes an unlawful increase of the debt of the corporation. The increase in the annual outlay for interest would be four hundred fifty-two thousand and eight hundred ninety-two dollars, (\$452,892).

The evidence, however, was to the effect that there would be an annual saving in expense brought about by the consolidations of at least five hundred thousand dollars, (\$500,000) per annum, and this evidence was uncontradicted. If it be correct there would be on the whole a considerable saving in outlay and a resulting benefit to the stockholders. If the question be regarded therefore from the point of view of the annual expenditures of the corporation the contention fails upon the ascertained facts. If we have regard to the principal of the debt, this principal remains the same; and we, as at present advised, know of no case or decision of a tribunal which in determining the amount of indebtedness which may be incurred by a corporation has held that the amount may be increased by consideration of the rate of interest.

The finding of the Public Service Commission of New York and the report of the Interstate Commerce Commission upon phases of the present controversy would appear to be authorities to the contrary.

Counsel for the contestant with great zeal and ability presented many other questions concerning the various steps of this proceeding which in their judgment rendered them invalid. The Commission has examined them all and has given its views upon those which it regards as having serious importance. After a careful hearing and consideration of the case, and having due regard to the unusually large interests involved, it has reached the conclusion that the consolidation and merger ought to be approved and that a Certificate of Public Convenience will be issued.

This certificate will, however, evidence the Commission's approval only of the consolidation or merger and the Commission expresses no opinion as to the effect of the ownership by the Consolidated company of the majority of the stock of the New York, Chicago, and St. Louis Railroad Company.

#### ORDER.

This matter being before the Commission on petition and protest on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, the Commission having on the date hereof made

and filed of record its report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof.

Now, to-wit, December 8, 1914, it is ordered that a certificate of public convenience issue, and in accordance with the said report approving the consolidation and merger as set forth in the petition and papers on file.

FRANK M. WALLACE, *Acting Chairman.*

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**CITIZENS' ELECTRIC ILLUMINATING COMPANY v. CONSUMERS' ELECTRIC COMPANY OF THE BOROUGH OF EXETER.**

*Crossing of facilities—Construction of crossings other than those approved.*

Where a company, after securing a Certificate of Public Convenience evidencing the approval of the Commission of the construction of certain crossings of its wires over those of another company, proceeds to construct crossings other than those mentioned in the certificate, the Commission must take cognizance of the fact as a practice contrary to law. However, if the additional crossings are in fact constructed in a manner proper for the safety and convenience of the public, the Commission will not order their removal.

Report and Order of the Commission.

Submitted January 19, 1915.

Decided January 21, 1915

*W. L. Pace*, for petitioner, Consumers' Electric Co.

*Ralph J. Baker*, for protestant, Citizens' Elec. Ill. Co.

**THE COMMISSION :**

The Citizens' Electric Illuminating Company, on January 19, 1915, filed with the Commission a protest and complaint against certain crossings of the facilities of the Consumers' Electric Company of the Borough of Exeter over the facilities of the complainant in the Borough of Exeter and West Pittston, and a hearing was held on this complaint at which both companies were represented and introduced testimony:

From the testimony it appears that the Consumers Company has in process of construction in the two boroughs mentioned lines for the transmission of electricity to be used in lighting the

streets of the Borough of Exeter and that the said Company, by a notice filed in accordance with the rules of this Commission [General Order No. 11, 2 P. C. R. 102] was proceeding to construct the aforesaid lines. The Citizens Company protested against the approval of the crossings mentioned in the aforesaid notice and a hearing was had on that matter, on January 7, 1915, and an investigation of the existing and proposed facilities of the Consumers Company was made at the direction of the Commission. After this hearing and investigation, the Commission issued its certificate of public convenience, approving the crossings mentioned in the notice filed in accordance with the rules of the Commission. The present complaint alleges that the Consumers Company is constructing and has constructed crossings in the boroughs mentioned which are not covered by the notice or by the certificate of the Commission.

The Commission has caused an investigation to be made of the lines of the Consumers Company already constructed and under process of construction in the two boroughs with a view to ascertaining the methods of construction, the particular points of crossing over the facilities of other public service companies and the manner in which said crossings should be constructed in order to provide for the safety of the public and the facilities of other public service companies. This investigation and the testimony produced at the hearing on this protest show that the Consumers Company is constructing or has already constructed certain crossings which were not provided for in the certificate of public convenience issued on January 8, 1915, and hence their construction was proceeded with contrary to the provisions of the Public Service Company Act, requiring approval of the character of the crossing in advance of actual construction. Of this we must take cognizance as a practice contrary to law, but under the facts in the present case it would, in our judgment, not warrant their removal as prayed for by the protestant company, because in point of fact all of said crossings as actually constructed are proper for the safety and convenience of the public, and the convenience, service and safety of the public will not be benefitted by their removal. In most instances the series of crossings involved in the construction of the lines are shown on the plan made on exhibit at the hearing, and in every instance, including the crossings not

covered by the said certificate issued January 8, 1915, have been examined by the engineer of the Public Service Commission and approved by him, subject to the conditions contained in the aforesaid certificate. This is true of both the crossings of the main transmission lines of the protestant and of the service lines.

The Commission, now, January 21, 1915, after investigation and hearing, finds and certifies that the way and manner of each and every crossing involved in the construction of the lines of the Consumers' Electric Company of the Borough of Exeter, in the Borough of Exeter and the Borough of West Pittston, which lines are indicated upon the plan filed by the said Consumers Company with the Commission, including the particular points of crossing of all the facilities of the Citizens' Electric Illuminating Company, are proper for the service, accommodation, convenience and safety of the public and the same are hereby approved as constructed or planned in accordance with the conditions and regulations set forth in the certificate of public convenience issued January 8, 1915, and subject to all and every the conditions therein set forth.

In testimony whereof, the Public Service Commission of the Commonwealth of Pennsylvania has caused this finding, determination and certificate to be signed by its acting chairman and duly attested by its secretary the day and year last above mentioned.

The Public Service Commission of the Commonwealth of Pennsylvania.

(Signed)

SAMUEL W. PENNYPACKER, *Chairman.*

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#### ADMINISTRATIVE RULING, No. 6.

*In the matter of discounts for prompt payment and penalties for delayed payment of bills.*

Article 3, Section 1, sub-section (c) of the Public Service Company Law, which went into full force and effect January 1, 1914, provides, that any public service company

"may require the payment of charges in advance, the making of reasonable minimum payments and deposits to secure future payments of such charges; or it may allow discounts for prompt payments of the same, or impose penalties for failure to pay promptly; Provided,

That, such advance charges, minimum payments, deposits, discounts, or penalties are reasonable and apply equally and without discrimination or preference to all shippers, consumers, and patrons, under like conditions and under similar circumstances," and

Article 2, Section 1, sub-section (d), of said act of assembly, further provides that

"Every public service company shall also file with and as a part of such tariffs and schedules and post, as directed, all rules and regulations that in any manner affect the said prices, charges, rates, fares, tolls, or other compensation."

Under the above provisions of the law, all public service companies imposing penalties for failure to pay bills promptly, or allowing discounts for prompt payment of bills, must provide in their posted and filed tariffs or in their rules and regulations which are part of said tariffs a rule clearly stating the said purpose for which, and the exact circumstances and conditions under which, penalties are imposed and discounts allowed, and in the case of allowance of discounts, stating also, in clear and unambiguous terms, whether or not payments mailed, as evidenced by the United States post office mark, on or previous to the last day of the discount period, will be deemed by the company to be a payment of the bill within such discount period.

No opinion is here expressed with respect to the propriety of the continuance or adoption of a rule providing for the mailing of payment on the last day of the discount period, but this ruling is issued merely for the purpose of requiring that such practices as are in vogue, or as may be adopted, shall be clearly set forth in the tariff and applied equally and without discrimination or preference to all shippers, consumers, and patrons, under like conditions and under similar circumstances, as provided by the afore-said act of assembly.

It is hereby ordered, That all public service companies shall comply with the above ruling by supplement to or re-issues of existing tariffs, on or before March 1, 1915, on five days previous notice to this Commission and the public, posted and filed as required by law.

The Public Service Commission of the Commonwealth of Pennsylvania.

A. B. MILLAR, *Secretary*.

Jan. 22, 1915.

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PETITION OF THE CORNWALL & LEBANON RAILROAD CO.

*Approval of grade crossing—Accommodation of the public—  
Burden of producing evidence.*

The petitioner asked the approval of the Commission for the construction of a siding at grade across Willow street in the city of Lebanon. The city protested. The preponderance of the evidence was to the effect that there is no public necessity for the crossing, the only benefit to be derived being a more economical means of delivering coal to the Lebanon Steam Co.

*Held:* The Commission would not be justified in approving a grade crossing over one of the most extensively travelled streets of a city, in the face of lack of consent by said city and protest made, unless the evidence produced at the hearing was certain and convincing that the approval is necessary for the service, accommodation and convenience of the public.

APPLICATION DOCKET No. 361.

Report and Order of the Commission.

Submitted December 7, 1914.

Decided January 8, 1915

*E. E. McCurdy*, for Cornwall & Lebanon Railroad Company.

*C. H. Killinger* and *S. P. Light*, for Lebanon Steam Co.

*Walter C. Graeff*, city solicitor, for city of Lebanon.

*Howard C. Sherk*, for property owners.

COMMISSIONER WALLACE:

This is an application by the Cornwall and Lebanon Railroad Company for the approval of the construction of a siding at grade across Willow Street in the city of Lebanon, at a point 140 feet west of the western boundary of North Seventh street in said city. The purpose of this siding is to furnish additional facilities to the Lebanon Steam Company (a public service company) for the delivery of coal at its plant. A protest against the granting



of a certificate of public convenience evidencing the Commission's approval of this grade crossing was filed by the city of Lebanon.

Section 18, Article V, of the Public Service Company Law, provides that the approval of the Commission of any application for the construction of a crossing at grade, or above or below grade, shall only be given when the Commission shall find or determine that the granting or approval of such application is necessary or proper for the service, accommodation, convenience or safety of the public. The applicant in this case, in the evidence produced at the hearing, has failed to show that this crossing would be for the service, accommodation or convenience of the public.

The Cornwall and Lebanon Railroad Company, after repeated efforts and most liberal offers, was unable to obtain the consent of the city of Lebanon to this crossing. It is true that the Commission has exclusive jurisdiction in the matter of the construction, alteration, relocation or abolition of crossings at grade, above or below grade. But the Commission would not be justified in approving a grade crossing over one of the most extensively travelled streets of a city in face of lack of consent by said city and protest made to the granting thereof, unless the evidence produced at the hearing was certain and convincing that the service, accommodation and convenience of the public would be attained. In this procedure the preponderance of the evidence is to the effect that there is no public necessity for the crossing in question, the only benefit to be derived being a more economical way of handling coal by the Lebanon Steam Company.

Therefore, it is the opinion of the Commission that the petition in this case should be dismissed and the approval of the grade crossing in question denied, and an order will be so entered.

#### ORDER.

This case being at issue upon petition and protest on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions

thereon, which said report is hereby referred to and made a part hereof:

Now, to-wit, January 8, 1915, it is ordered: That the petition be and the same is hereby dismissed, and the certificate of public convenience evidencing the Commission's approval refused.

By the Commission.

FRANK M. WALLACE, *Acting Chairman.*

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THE COMBINED COMMITTEE OF THE UNITED BUSINESS MEN'S  
ASSN., ET AL., V. PENNSYLVANIA RAILROAD CO., ET AL.

*Rates—Discrimination—Fair return on passenger traffic—Classification of commutation tickets.*

The complainants alleged that the rates set forth in proposed tariffs filed by the respondent companies were unreasonable and discriminatory. The testimony presented by the respondents showed a marked increase in the ratio of operating expenses to operating income, and a decrease in the annual return on their investment. It showed further that the passenger traffic yields a lower rate of net return than does the freight traffic. The testimony of the complainants was confined to that of one witness who expressed the opinion that the proposed increases would retard the development of the suburbs of Philadelphia.

The Commission examined the proposed tariffs and made an order prescribing the reasonable classification of tickets and rates therefor.

*Held:* 1. The railroads are entitled to an increase in passenger rates. The Commission cannot compel the roads to operate this branch of their business at a loss and recoup by an increase in freight rates. The roads are entitled to earn a fair profit on every branch of their business, subject to the limitation that their corporate duties must be performed even though at a loss.

2. The five classes of tickets following are necessary for the accommodation of suburban passengers:

- (a) A 46-trip school, a 60-trip monthly, and a 180-trip quarterly commutation ticket;
- (b) A 100-trip individual ticket good for a period of at least six months;
- (c) A 10-trip ticket good for bearer and those accompanying the bearer and valid for three or more months;
- (d) A 1,000-mile ticket usable either for local or long distance trips; and
- (e) The ordinary single-trip and round-trip tickets.

3. The same classes of tickets for suburban traffic should be sold on all suburban lines and no arbitrary discrimination made between stations on the same or different lines.

## COMPLAINT DOCKET No. 315.

## Report of the Commission.

Submitted November 30, 1914.

Decided December 12, 1914.

*Francis Chapman, Ward W. Pierson, Harold S. Shertz, Matthew Randall, Edwin M. Abbott, Edward B. Martin, Louis J. Palmer, William Cooper, J. Paul MacElree, J. S. Freeman, Charles A. Moore, Geo. M. Henry, A. B. Roney, and Julius C. Haas, for complainants.*

*Henry Wolf Bikle, William I. Shaffer, William L. Kinter, William B. Linn, and Richard W. Barratt, for respondents.*

## COMMISSIONER JOHNSON:

This case involves the reasonableness of changes in passenger fares contained in tariffs filed and posted by the defendant carriers about November 14, 1914, to become effective, in most instances, December 15, 1914. The complaints against the proposed changes in fares were heard at an informal hearing on the 27th of November, and at formal hearings on the 10th and 11th of December. The finding and order of the Commission were reached and issued December 12, 1914, [see ante, p. 262] as promptly as possible after the formal hearing, for the purpose of enabling the order of the Commission to become effective not later than the 15th of December, upon which date most of the increased fares filed by the carriers in November would otherwise have become effective. The issuance of the order thus promptly made necessary the formulation, at a later date, of the reasons that led the Commission to the conclusion set forth in its finding. The facts that determined the finding of the Commission are now stated in this opinion.

The principal changes in passenger fares announced in the tariffs issued by the defendant carriers November 14, to become effective December 15, 1914, (for the Baltimore and Ohio Railroad Company, December 19,) were as follows:

The withdrawal from sale of the 100-trip individual ticket, valid for one year, which the Pennsylvania Railroad Company, the Philadelphia, Baltimore and Washington Railroad Company, the Philadelphia and Reading Railway Company, and the Baltimore and Ohio Railroad Company had sold within the Philadelphia suburban district—but not elsewhere within the State—

at low rates of fare ranging roughly from  $1\frac{1}{2}$  cents per mile for short distances to less than 9-10 of a cent per mile for the distance between Philadelphia and points in the outer portions of the zone to which suburban fares were applied.

The Philadelphia and Reading Railway Company withdrew from sale a 26-trip annual ticket, good for bearer, which it had sold to a limited number of suburban stations; and a 50-trip individual ticket, good for one year, which it sold to the majority of the stations in the Philadelphia suburban district. The Philadelphia and Reading Railway Company had sold 100-trip tickets to the Philadelphia suburban stations to which the 50-trip tickets were not sold, the rate per mile for both tickets being about the same and also similar to the charges made by the Pennsylvania Railroad Company for 100-trip tickets. The Pennsylvania Railroad Company withdrew from sale a 50-trip yearly firm and family ticket that had been sold on the basis of 2 cents per mile.

There was to be an increase, with minor exceptions, of 25 cents in the charge for 60-trip monthly commutation tickets, and of 20 cents in the price of 46-trip monthly school tickets. The cost of the 180-trip quarterly commutation ticket was made three times the charge for a 60-trip monthly ticket. The monthly and quarterly tickets were to continue to be sold as previously, for periods respectively of one and three calendar months.

The sale of 10-trip strip tickets was discontinued and in lieu thereof, a 10-ride card ticket, good for bearer and those accompanying the bearer, was to be sold at 10 per cent. less than the charge for ten single trip tickets,—or at the average rate of  $2\frac{1}{4}$  cents per mile.

The rate for round-trip tickets throughout the State was somewhat raised by making the charge for a round-trip ticket double the cost of a single trip ticket which is generally sold upon the basis of  $2\frac{1}{2}$  cents per mile. No change was made in the suburban local one-way fares.

Workmen's strip tickets sold at a few Philadelphia suburban points were withdrawn from sale.

Complaints against the announced changes in fares were received from several organizations and individuals. The complaints, with few exceptions, were directed against the changes in the tickets and fares applying in the Philadelphia suburban dis-

trict, and at the hearings, the testimony introduced by the defendants was presented to prove, and the arguments of the complainants were advanced to disprove, the necessity and justification of the proposed changes in the fares charged between Philadelphia and suburban stations. With the exception of the discontinuance of the sale of round-trip excursion tickets at reduced fares, the questions at issue and the opinion in this case are concerned only with the changes that were proposed to be made in tickets and fares applying to suburban traffic.

The complaints and petitions received by the Commission were promptly and carefully examined, and the Commission began an investigation upon its own motion by appointing a preliminary public hearing for November 27th in Philadelphia. At that hearing all complainants were heard who desired to present their case to the Commission informally, and at this hearing some thirty complainants, some speaking as representing organizations, others speaking as individual protestants, stated their objections to the changes proposed in the Philadelphia suburban fares. The statements made to the Commission at this preliminary hearing indicated clearly the effect which the proposed fares would have upon the charges payable by purchasers of commutation and other suburban tickets in the Philadelphia district. This being an informal hearing, the carriers did not present testimony in support of the proposed changes in fares.

The importance of this case to the public caused the Commission to desire to reach a determination of the question at issue before December 15, 1914—the date upon which the proposed increase in most of the fares was to become effective. Because of some uncertainty as to whether or not the Act of July 26, 1913, granted power to the Commission to suspend proposed rates, it was thought important by the Commission to investigate and determine the reasonableness or unreasonableness of the proposed increased fares and to reach a decision a few days before the 15th of December. It was hoped that the carriers would voluntarily give the Commission more time for the investigation and determination of the question. Before the hearing of November 27th, the counsel of the Commission appealed to the counsel for the Pennsylvania Railroad Company to have the carriers voluntarily postpone the proposed changes in fares to a date sufficiently later

than December 15th to enable the Commission to have ample time to hear and determine the case. The counsel for this defendant pleaded lack of authority to have the effective date of the proposed change postponed, but stated that the official in charge of the traffic department of the company had such authority. Subsequent to the hearing of November 27th, i. e., on November 30th, that official was requested by Commissioner Johnson to postpone the date of the proposed increase in fares, but he refused assent.

On the first of December, at the opening of the session of the first meeting of the Commission after the preliminary hearing on the 27th of November, the Commission decided to hold a formal hearing in Philadelphia on the 10th of December. At this hearing, which continued through the 10th and 11th of December, testimony was presented by the carriers intended to show the necessity for increased revenues and to prove that their passenger fares had not been adequately remunerative during recent years. The petitioners in rebuttal called only one witness, a real estate operator, who testified that the proposed increase in fares would retard the development of the suburbs in which he and others were interested. The petitioners relied upon cross examination and upon argument of counsel to present their side of the case.

The issues raised in this proceeding require the determination of three questions:

Are the defendant carriers entitled to an increase in passenger revenues?

What is a reasonable schedule of suburban passenger fares in Pennsylvania, and in the Philadelphia suburban district, in particular?

In what particulars, if any, were the tariffs which the defendant carriers filed and posted November 14, 1914, to become effective December 15, 1914 (for the Baltimore and Ohio Railroad Company, December 19, 1914), unreasonable?

In support of the necessity for increased revenues in general and for larger passenger earnings in particular, the counsel for the Pennsylvania Railroad Company and for its subsidiaries, the Philadelphia, Baltimore and Washington Railroad Company and the Northern Central Railroad Company, presented detailed tables setting forth the financial history of the companies for the fifteen years ending June 30, 1914. The figures for all three companies

show a marked increase in the ratio of operating expenses to operating income, and an equally marked decrease in the annual percentage of return upon investment in the property. Although there had been a growth in freight and passenger traffic, there had been more than a proportionate rise in operating expenses and taxes. In the fiscal year, 1900, the Pennsylvania Railroad Company paid out 69.59 per cent. of its operating revenue for operating expenses and taxes; in 1914, 80.66 per cent. of the operating revenue was required for operating expenses and taxes. During the five years from 1905 to 1909, inclusive, the Pennsylvania Railroad Company secured an average return of 7.57 per cent. upon its property investment; during the five years ending with June 30, 1914, the average return was 5.83 per cent.; and, during the year ending June 30, 1914, it was 4.83 per cent. The showing for the Philadelphia, Baltimore and Washington Railroad and for the Northern Central Railroad were less favorable than for the Pennsylvania Railroad Company.

The counsel for the Philadelphia and Reading Railway Company introduced into the record a statement of the revenues and expenses of that company only for the years 1907 and 1914. This statement shows that the company's gross operating revenue increased less rapidly during the seven years than did its expenses for operation, taxes and rentals for equipment,—the net operating income being \$1,831,862 less in 1914 than in 1907. Although general tendencies are not necessarily revealed by comparing two selected years, and although the year 1907 was a prosperous one for most railroads, the actual large decline in net income shown by comparing 1914 with 1907 is a significant fact.

The Baltimore and Ohio Railroad Company, presumably because it has but a small volume of passenger traffic in the Philadelphia suburban district, did not present testimony as to its revenues and expenses.

For the purpose of determining the question at issue, it is especially important to know whether the net returns from the passenger business have, during recent years, been increasingly or decreasingly profitable to the defendants. This is not easy to determine with exactness, because of the difficulty of apportioning expenses between the freight and passenger services; but the exhibits put into the record by the respondents indicate that the net

returns from the passenger traffic have declined much more rapidly than have the net returns from the freight services. The figures presented for the Pennsylvania Railroad Company (Exhibit No. 12) are to the effect that the ratio of expenses to revenue for the freight service was 71.75 per cent. in 1908 and 73.39 per cent. in 1913; while, in the passenger service, the ratio of expenses to revenue was 79.03 per cent. in 1908, and 92.54 per cent. in 1913.

An exhibit presented by the Philadelphia and Reading Railway Company (P. & R. Exh. No. 2) shows that the gross passenger revenues of that company were less in the fiscal year 1914 than in 1910 or in 1913. The expenses for the passenger services are not separately stated, but as the gross expenses for the freight and passenger services combined have largely increased during recent years, it may be assumed that the expenses of the passenger service have risen. The Philadelphia and Reading Railway revenues from its suburban traffic within the district between the Philadelphia Terminal and Norristown, Chestnut Hill, Lansdale, Doylestown, Noble, Fox Chase, Bustleton and Frankford, are stated (P. & R. Rwy. Exh. No. 3) to have been \$1,368,727, during the year ending June 30, 1907, and \$1,260,566.77 during the year ending June 30, 1914,—the suburban passenger receipts being \$108,160.23 less in 1914 than in 1907.

It is a matter of common knowledge that the construction of enlarged passenger stations and terminals, the introduction of steel equipment, the elevation of tracks, the rise in wages, and the requirements of legislation have, during recent years, added largely to the expenses of the passenger service. Many of these added expenses have been incurred in improving the passenger service which is notably better to-day than it was a decade ago. The detailed statistical statements contained in the record of this case are in harmony with well-known facts as to the increase in the operating and other expenses of the railway service.

The evidence presented by the respondents seem to justify an effort upon their part to obtain a reasonable increase in revenues from their services as a whole, and also shows that the passenger service yields a lower rate of net return than does the freight traffic. May the respondent carriers justly seek to secure some additional revenue by increasing passenger fares?

It was argued by some of the counsel for complainants that, if



the railroads are in need of larger revenues, the necessary additions to income should be secured solely by raising freight rates; that a moderate advance in freight charges would not be noticeably burdensome to shippers and consumers; while higher passenger fares—especially fares payable by suburban residents—are especially burdensome and tend to prevent that distribution of population throughout the suburbs which is recognized to be socially advantageous.

This argument is plausible; but it fails to take into account two facts, one economic and the other legal.

The passenger traffic in general, which is now less profitable to the carriers than the freight service is, has, because of the rise in expenses, tended in recent years to become decreasingly profitable. The testimony and exhibits introduced in this case present detailed evidence as to this state of facts.

If it were held, however, that the railroads might wisely be required to secure the net income to which they are equitably entitled mainly or entirely from the freight traffic and to perform their passenger services at fares that yield revenues but slightly, if at all, in excess of the actual expenses of the service, it is certain that legal obstacles would be encountered in the enforcement of such a policy by statute or Commission order. The Supreme Court of Pennsylvania in its decision in *Pennsylvania Railroad Company v. Philadelphia County*, 220 Pa. 100—the decision in which the two-cent maximum fare act of April 5, 1907, was held to be unconstitutional—held that the railroads could not be required to conduct their passenger services without profit, although it were shown that their freight traffic yielded a fair return of profit upon their entire business. The language used by the court was:

“Another objection to the method pursued in the investigation of this subject is that the court (of Common Pleas) confined the inquiry to the passenger traffic instead of taking into consideration the entire traffic of every kind as appellant claims should be done.

. . . “True business principles require that the passenger and freight traffic not only may, but should be separately considered. The intelligent business of the world is done in that way. Every merchant and manu-

facturer examines and ascertains the unprofitable branches of his business with a view to reducing or cutting them off entirely, and there is no reason why a railroad or other corporation should not be permitted to do the same thing as long as its substantial corporate duties under its franchise are performed. . . . And unless necessary for the fulfillment of their corporate duties they should not be required to do any part of their business in an unbusinesslike way with a resulting loss. If part is unprofitable it is neither good business nor justice to make it more so because the loss can be offset by profit on the rest. To concede that principle would, as the court below indicated, permit the legislature to compel the carriage of passengers practically for nothing though the inexorable result would be that freight must pay inequitable rates that passenger travel may be cheap. The corporation is entitled to make a fair profit on every branch of its business subject to the limitation that its corporate duties must be performed even though at a loss."

The difficult question to determine is what schedule of fares for commutation and other suburban passenger traffic in Pennsylvania will be just to the travelling public and yield "a fair profit" to the defendant carriers. The question specifically before the Commission concerns the fares in the Philadelphia suburban district.

Passengers travelling between a large city and its suburbs include several groups of persons having fairly distinct demands for transportation. There is the commuter whose business or work requires him to travel daily between his suburban home and the city; there are the children who live in the suburbs and attend school in the city; residents of the suburbs who do not travel to the city daily but who are required to go into the city more or less regularly two or three times a week upon the average; and the suburban residents who go to the city irregularly, possibly once a week or less upon the average, for business or social purposes.

The daily commuters' needs are met by a 54-trip or a 60-trip monthly ticket and an 180-trip quarterly ticket. The school chil-

dren's requirements are met by a 46-trip monthly ticket. The suburban resident who is required to go to the city regularly two or three times a week is well served by a 100-trip ticket valid for a period of six or more months or by a 50-trip ticket valid for three or more months. The monthly, school and quarterly commutation tickets and the 100-trip and 50-trip tickets are issued to serve the needs of the individual purchaser and may rightly be limited to use by the individual buying the ticket.

The suburban resident who goes to the city irregularly and as infrequently as once a week on the average, has a transportation demand not greatly different from the demand of the ordinary passenger traveling from one city to another; but, inasmuch as the suburban resident who visits the city irregularly uses the railroad somewhat more frequently than do passengers traveling to points beyond the suburban section, the railroads have very properly sold ten-trip tickets at a discount from the regular one-trip fare. The ten-trip ticket (strip or card) being good for bearer, can be used by different members of a family, by household servants or by others who make occasional trips between suburb and city. The ten-ride ticket is also convenient and economical for parties making a trip from the suburbs to the city or from the city to the suburbs or country. Individuals, families, and parties traveling occasionally between the suburbs and the city may also use a thousand-mile ticket to advantage. The individual resident of the city or suburbs who makes only infrequent trips to or from the suburbs will naturally desire a ticket for a single trip.

Five classes of tickets would seem adequately to meet the needs of suburban passengers.—(1) The 46-trip school, the 60-trip monthly, and 180-trip quarterly commutation tickets, (2) the 100-trip individual ticket good for a period of at least six months, (3) the ten-trip ticket good for bearer, and those accompanying the bearer and valid for three or more months, (4) the 1,000-mile ticket usable either for local or long-distance trips, and (5) the ordinary single-trip and round-trip tickets.

These five classes of tickets, but with periods of validity different from those just stated, have been sold in the Philadelphia suburban district. The Pennsylvania roads out of Philadelphia have also sold a 50-trip family and firm ticket at the average rate of two cents per mile. If a ten-trip ticket good for bearer is sold

at not to exceed two cents per mile, there will be no need to continue the sale of the 50-trip family or firm ticket.

The Philadelphia and Reading Railway Company has sold a 26-trip ticket to twenty-nine of the ninety stations which it includes in its Philadelphia suburban section. The charge per mile for this ticket seems to have been adjusted somewhat arbitrarily to meet competitive conditions, and to have averaged from two cents to a cent and a half or somewhat less per mile.

The practice of the Philadelphia and Reading Railway Company has been to sell a 50-trip individual ticket, valid for one year, to sixty-one of the ninety suburban stations, and a 100-trip individual ticket, good for a year, to thirteen of the ninety stations. The 26-trip ticket was not sold for the stations to and from which the 50-trip ticket could be used, and the rate per mile for the 50-trip ticket averaged lower than the ordinary charge per mile for the 26-trip ticket. For the thirteen stations to and from which the 100-trip tickets were sold, there were no 50-trip tickets. The treatment accorded different stations seems to have been arbitrary and discriminatory. By the tariffs filed November 14, 1914, to become effective December 15, 1914, all three of these tickets, the 26-trip, the 50-trip, and the 100-trip, were cancelled. Workmen's tickets which the Philadelphia and Reading Railway Company sold, good between Philadelphia and six stations, were also withdrawn.

In order to avoid arbitrary discriminations as between stations upon the same railroad and as among suburbs located upon different lines of road, the same classes of tickets for suburban traffic ought to be sold upon all suburban lines out of a large city. The several kind of tickets sold should adequately and equitably meet the needs of the different classes or groups of passengers; and, at the same time, there should not be more kinds of tickets sold than are needed to meet the requirements of the public.

It is our opinion that the tariffs filed and posted by the defendants November 14, 1914 (by the Baltimore and Ohio Railroad Company, November 20th), to become effective upon thirty days' statutory notice would inequitably increase the fares payable by large numbers of suburban passengers, and that the tariffs are unreasonable in the following particulars:

1. In not providing for the sale of an 100-trip individual ticket.

This ticket has been sold by the Pennsylvania Railroad Company in the Philadelphia suburban district for nineteen years and by the other defendant companies for a number of years. The withdrawal from sale of this ticket, and of the 50-trip ticket that has long been sold by the Philadelphia and Reading Railway Company, would compel many of those who have traveled upon these tickets to pay higher fares than may equitably be required of passengers who average two or three round-trips weekly between the suburbs and the city. The needs of this class of passengers should be met by the sale of an 100-trip individual ticket valid for a period of not less than six months and sold at a reasonable average rate of fare.

The charge for this ticket has been double the charge for the 60-trip monthly commutation ticket, and the 50-trip ticket that has been sold by the Philadelphia and Reading Railway Company has been upon about the same basis of charges as has the 100-trip ticket. These 100-trip and 50-trip individual tickets have been largely used by daily commuters, because the purchaser was practically certain to use up the entire ticket, whereas if he bought a monthly ticket (which was valid not for a month from the date of purchase but only to the end of the calendar month in which the ticket was bought) he might not use a large part of the ticket. The daily commuter's monthly and quarterly tickets should be valid for one month and three months respectively from the date of purchase.

The 100-trip ticket is not intended for the daily commuter, but for the passenger who makes less frequent and less regular trips, and the charges for the 100-trip ticket may equitably be upon an appreciably higher basis than the charge for the monthly or quarterly tickets. It would seem that fares paid by those who ride upon 100-trip tickets might justly be midway between the fares paid by daily commuters and the charges paid by those who use ten-trip tickets; and it is our opinion that the charge for the 100-trip ticket ought not to exceed one and one-half cents per mile. Such tickets should be valid for at least six months from date of purchase.

The tariffs filed and posted by the Philadelphia and Reading Railway Company November 14, 1914, abolished the 100-trip, 50-trip, and the 26-trip tickets. It is held that this company, instead

of selling one or more of these three classes of tickets between Philadelphia and its several suburban stations, should sell 100-trip tickets to and from each of the stations in the Philadelphia suburban district.

2. The tariffs filed and posted November 14, 1914 (for the Baltimore and Ohio Railroad Company, November 20), are unreasonable in not providing that the 46-trip monthly school ticket and the 60-trip monthly ticket shall be valid for one month from the date of purchase and that the quarterly ticket shall be valid for three months from the date of purchase.

The charge for the school ticket has been increased about twenty cents, and the price of the monthly ticket has been advanced twenty-five cents. These increases in fares, which amount to from two to five per cent. of the cost of the ticket are comparatively small and are not considered unreasonable. The charge for the quarterly ticket is made three times the price of a monthly ticket; but the basis of the proposed charge seems reasonable. The quarterly ticket is not used by many passengers.

3. The tariffs in question provide for an unreasonably high charge for the ten-trip ticket. It is our opinion that the charge for such a ticket ought not to exceed two cents per mile, and that the charge proposed— $2\frac{1}{4}$  cents per mile—is inequitably high.

One other important change in fares is contained in the tariffs in question—the sale of round-trip or excursion tickets at less than double the one-way fare is discontinued by the respondent companies. The change applies not only in the Philadelphia suburban district, but generally throughout the State, and it affects an appreciable, though not a large, increase in the fares payable by many passengers. In the past one reason for selling round-trip tickets at a discount has been to meet the competition of a rival line. The practice of selling round-trip tickets at less than double the one-way fare does not prevail in all sections of the country. From the meagre evidence before us, it does not appear that the increase in fares resulting from charging for a round-trip ticket twice the one-way fare is unreasonable.

The decision reached after a careful consideration of this case is that the defendant carriers ought to be allowed some increase in passenger revenues; but that the tariffs filed November 14th, and November 20, 1914, would impose unreasonable burdens

upon the public. For the reasons stated in this opinion, the Commission's order of December 12, 1914, was issued requiring the withdrawal of the above-named tariffs and the filing and posting of other tariffs providing fares held by the Commission to be reasonable.

ORDER.

NOTE: For the order of the Commission see ante, p. 262.

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SLATE BELT TELEPHONE & TELEGRAPH CO. v. BLUE MOUNTAIN  
TELEPHONE & TELEGRAPH CO.

*Crossing of facilities—Approval of.*

Where complaint was made alleging that certain crossings of wires had been constructed in violation of a general order of the Commission, and it appeared that only one such crossing had been constructed since January 1, 1914, which one was constructed in a satisfactory manner and approved by the complainant, it was

*Held:* The complaint should be dismissed.

*Approval of franchise contracts—Investment made in good faith prior to approval.*

Where, upon application made for the Commission's approval of franchise contracts with a number of municipalities it appeared that the applicant had a legal right to furnish service in one borough and the adjacent territory, having acquired such right prior to July 26, 1913; that it had proceeded with the construction of its plant in good faith and had constructed lines in other boroughs under ordinances duly passed prior to July 26, 1913, but not effective until after said date by reason of their not having been posted and published; that it had made an investment of \$53,094.45 before its rights were questioned; and that it offers the only connection between the communities served and the users of independent telephones throughout the State, it was

*Held:* The franchise contracts should be approved.

COMPLAINT DOCKET No. 156.

Report and Order of the Commission.

Submitted February 18, 1914.

Decided January 8, 1915.

*Wm. S. Kirkpatrick* and *H. D. Maxwell*, for complainant.

*Joseph M. R. Long* and *J. Davis Brodhead*, for respondent.

**COMMISSIONER BRECHT:**

On the 2d day of March, 1914, the Slate Belt Telephone & Telegraph Company filed a complaint with this Commission against the Blue Mountain Telephone & Telegraph Company alleging in substance that the said Blue Mountain Telephone Company had crossed the lines of the complainant "in a number of instances" . . . "to the injury and damage of complainants and in violation of General Order No. 2 of the Public Service Commission," that the Blue Mountain Company had been discriminating in its method of doing business by granting preferential rates to some of its subscribers, and that the said corporation had been operating unlawfully in a territory already occupied by another company giving adequate service at reasonable rates.

A hearing was held before the Commission on the matter on the 8th of May following, and the testimony of a number of witnesses taken. The evidence submitted at this hearing related chiefly to the questions of crossing the lines of the Slate Belt Company by the respondent company, the matter of preferential rates alleged to have been offered by the Blue Mountain Company to some of its patrons, and the character of the plant owned and operated and the service furnished by the respective parties in interest.

From the record it appears that there was only one crossing constructed across the lines of the Slate Belt Company after January 1, 1914, which crossing was pronounced satisfactory to his company by the president of the Slate Belt Telephone & Telegraph Company. All the other crossings referred to in the testimony appear to have been made before that date and constructed with respect to clearance and pole attachments in a safe and satisfactory manner. Should any of the said crossings, however, prove to be defective or otherwise improper, their faulty construction may be brought to the attention of the Commission at any time upon complaint and the trouble corrected.

The testimony offered to show the granting of preferential rates was not sufficiently explicit to substantiate the charge, nor even well enough founded to indicate that any serious thought had ever been given to the matter by the management of the company involved. In the matter of plant construction and operating



efficiency it is shown by the testimony that the Blue Mountain Telephone & Telegraph Company had installed a modern switch-board, copper wires and cables, and given a prompt and satisfactory service.

After the aforesaid hearing had been in progress practically an entire day and very considerable testimony taken respecting the legal right of the respondent company to establish, maintain and operate a telephone system in the territory affected, it appeared that the respondent was operating in several boroughs under ordinances that were passed subsequently to July 26, 1913, and should therefore have obtained the consent of the Public Service Commission before attempting to enter upon the streets and highways of the boroughs in question to construct a telephone system. When this point seemed to be clearly established at the hearing it was suggested by the Commission, and agreed by counsel of both parties in interest, to amend the complaint then pending so as to have the matter brought to the attention of the Commission in the form of a petition from the Blue Mountain Telephone & Telegraph Company for Certificates of Public Convenience to enter the various boroughs where ordinances were passed after the Public Service Act went into effect.

Accordingly on the 1st of October, 1914, the Blue Mountain Telephone & Telegraph Company filed a petition asking the Public Service Commission to grant it Certificates of Public Convenience for the purpose of "constructing, maintaining, operating, buying and leasing telephone and telegraph lines" in the Boroughs of Pen Argyl, Windgap, Roseto, and East Bangor, all located in the County of Northampton, Pennsylvania. Ordinances had been regularly enacted, published and posted as required under the law by petitioner in all the aforesaid boroughs as follows: In the Borough of Pen Argyl the ordinance granting petitioner the right to exercise its corporate powers within the limits of said borough was passed on the 15th day of July, 1913, but the ordinance not being duly published and posted before July 26, 1913, the day when the Public Service Company Law went into effect, which required the approval of contract between a public service company and municipal corporation by this Commission, a supplement to said ordinance was passed on the 6th of July, 1914, complying fully with the requirements of the law and containing the

stipulation required by the Public Service Commission; in the Borough of Windgap the ordinance was passed on the 2d day of June, 1913, but not being published and posted as required by law until the month of September following, the Act of July 26, 1913, made it necessary to enact and pass a supplement to the said ordinance which was done accordingly, complying with all requirements, on the 8th day of June, 1914; in Roseto the ordinance was passed on July 17, 1913, and a supplement thereto on the 5th of May, 1914; in the Borough of East Bangor the ordinance was passed by its council on the 20th of June, 1913, and the resolution amending the ordinance on the 4th of May, 1914.

A protest was entered by the Slate Belt Telephone & Telegraph Company against the approval of the petition by the Commission, alleging that the protesting company already occupies the given territory with a telephone system, that the protestant is giving satisfactory service, and that if permission would be granted to petitioner to enter a territory so limited in area and population the competition resulting therefrom would seriously injure if not destroy the property values of the Slate Belt Company.

The Slate Belt Telephone & Telegraph Company, it appears, was incorporated in April, 1896, for the purpose of providing telephone service in certain specified portions of the Counties of Northampton, Monroe, and Lehigh. It began operations at once by taking over an existing telephone line which had been built and operated by a private individual. Since then it has made some additions to plant facilities, rebuilt portions of its lines and purchased a new switchboard and other minor equipments. On May 1, 1914, it had 1,071 telephones installed and a capital investment of \$100,000 in its plant, of which \$50,000 is carried as stock and \$50,000 as bonded indebtedness bearing 6% interest. It declared no dividend prior to March 1, 1913, but on that date, and since then, it paid a semi-annual dividend of 2½%. Its lines of wires are chiefly confined to what is known as the slate region, and connect the towns of Bangor, Nazareth, Pen Argyl, Windgap, Easton and a few other places of minor importance. Its service between Bangor, Pen Argyl, and Easton has been more or less congested at times and was not regarded as adequate or satisfactory by some of its patrons. The long distance business of the protestant com-

pany is transmitted over the lines of the Bell Telephone System by traffic agreement.

On the 15th of March, 1913, the Slate Belt Company established a toll charge over all its local lines, which action met with a serious protest from the citizens of Bangor, Pen Argyl, and Portland. A concerted effort was made by its subscribers from these towns to prevail upon the Slate Belt Company to cancel the proposed toll rates and to make in lieu thereof, if the revenue derived from the business was insufficient for operating purposes, an advance in the regular service charges. Failing in their object the protesting subscribers then took steps to organize a new telephone company, and on the 20th of May, 1914 (1913), the Blue Mountain Telephone & Telegraph Company was incorporated and authorized by its charter to build telephone lines from Bangor through Pen Argyl and adjoining towns in the slate region to the City of Easton, and from the aforesaid boroughs of Northampton County into Lehigh County to the City of Allentown, and from several points in Northampton County by way of the Delaware Water Gap to Stroudsburg, in Monroe County, thus obtaining letters patent to enter practically the same field in which the Slate Belt Company has been operating.

In the application of the petitioner it is recited that the new company has a capital stock of \$50,000 divided into 2,000 shares of the par value of \$25 each, that of the aforesaid shares there were "subscribed to the date of this petition 437 shares, divided among 149 stockholders, residing in the County of Northampton : . . and fully paid into the treasury of the said company," that in pursuance of the powers and privileges vested in the said Blue Mountain Company the Borough of Bangor passed an ordinance on the 16th of June, 1913, permitting the said company to enter the said borough and occupy its streets and highways for the purpose of constructing, maintaining, and operating a system of telephone lines, that in further pursuance of its charter privileges and rights and "by virtue of the ordinance of the Borough of Bangor" and "similar ordinances" granted to the said company about the same time by the Boroughs of Pen Argyl, Windgap, and East Bangor, the Blue Mountain Telephone & Telegraph Company thereafter and prior to January 1, 1914, proceeded to construct its lines of poles and wires in the Boroughs of Bangor,

Pen Argyl, and Windgap, its poles and trunk lies from the Borough of Bangor to Pen Argyl, thence to the Borough of Windgap, and thence to the village of Roscommon, in Monroe County; and "poles and four trunks from the Borough of Windgap, toward the city line of the City of Easton, which said line to the said city was completed shortly after said day," viz, January 1, 1914.

The following facts were developed at the hearings held in this case: The territory known as the slate region in which both parties in this proceeding are operating is a comparatively small district containing about from fifteen to twenty thousand people. The various boroughs within the region are in close proximity to one another, being only from a half to three miles from each other, and so closely inter-related in their social life and business interests that they form practically one community in thought and interest. Both the petitioner and the protestant have toll or long distance connections with places lying outside of the immediate district; the Slate Belt Company connects by a traffic agreement with the Bell Telephone Company, the Blue Mountain Company by traffic arrangement with the Consolidated and a few other nearby local companies.

The ordinance passed by the Borough of Bangor, giving the Blue Mountain Company the right to construct, maintain and operate a telephone system on the streets and highways of that borough, was regularly enacted and went into effect before July 26, 1913. The Blue Mountain Telephone Company, therefore, holds a valid franchise to-day to own and operate a telephone plant in the Borough of Bangor and cannot be restrained by this Commission from exercising its vested charter rights within the aforesaid borough. The said Blue Mountain Company is also invested with power by its charter to occupy, maintain and operate a telephone system upon the highways of the various villages and townships in that region enumerated in its articles of incorporation without obtaining a Certificate of Public Convenience from this Commission.

Some time in August, 1913, the Blue Mountain Company began the construction of its telephone plant in the Borough of Bangor and along the highways of adjoining townships, through the Borough of Pen Argyl, the Borough of Windgap, and towards the City of Easton, expending \$53,094.45 in plant construction and

plant equipment before any proceedings were instituted to question the legal character of its contract rights. Since the verbal agreement made between the parties in interest after the first hearing held in May, 1914, there has been no extension of the plant except that a few shares of stock were sold to subscribers residing in the Borough of Bangor, where the petitioner has a legal contract to maintain and operate a telephone plant.

The new plant in question is constructed of the best material offered in the market for telephone service. Its wires and cables are copper, its switchboard modern and of sufficient size to meet the needs of future development, and its transmission lines between the larger centers of population sufficient in number to prevent any congestion of the wires even during the hours of the day when the pressure of business is greatest. Between the Boroughs of Bangor and Pen Argyl there is a 100-trunk cable enabling 100 persons to talk at one time at each end of the line; between the Borough of Pen Argyl and the City of Easton there are four trunks; all the service on the lines of petitioner between local points and the City of Easton is free. Because of the limited number of free trunks operated by the Slate Belt Company between Bangor and Pen Argyl and Pen Argyl and Easton the service is frequently congested at these points and persons are unable to transact business promptly. There are, however, toll trunks operated by the Bell Telephone Company between Bangor and Easton and Pen Argyl and Easton, which the subscribers of the Slate Belt Company are permitted to use by paying toll.

At Roscommon, Monroe County, the Blue Mountain Company connects with the Stroudsburg and Bushkill Telephone Company, a local concern operating at Stroudsburg, Mount Pocono, Delaware Water Gap, and surrounding points.

The Stroudsburg and Bushkill Company has 975 subscribers and can reach the City of Easton since October 1, 1913, only over the wires of the Blue Mountain Company. At that time the Bell Telephone Company "discontinued and disallowed any business or conversation within a radius of fifty miles" from Stroudsburg over the lines of the local company; the said Stroudsburg and Bushkill Company, and the Slate Belt Company would not receive or transmit any message either way between Stroudsburg and the City of Easton. Since then the only line of communica-

tion by telephone between subscribers of the Stroudsburg and Bushkill Company and the City of Easton is that of the Blue Mountain Company. The average number of calls over these lines for or from Easton in a day during the busy season is from fifty to sixty. The City of Allentown, Bethlehem, and all of the other large communities lying within a radius of fifty miles from Stroudsburg can only be reached by the Stroudsburg and Bushkill subscriber from his own telephone over the lines of the petitioner, the Blue Mountain Telephone & Telegraph Company.

By reason of its contractual relations with the Consolidated and other independent companies, the petitioner is enabled to open telephone service in the slate region to the State at large where there are over 280,000 independent telephone subscribers who could not otherwise over their own lines reach the public of the slate region, and with whom the people of the slate region could not otherwise have any direct communication by telephone.

There are several circumstances connected with the foregoing facts which when viewed in their proper proportion and bearing are found to be of material weight in arriving at an equitable determination of this matter. The petitioner by virtue of its charter and a duly enacted legal ordinance in the Borough of Bangor, has expended over \$50,000 for plant construction and equipment to establish and operate a telephone system upon the highways of the said borough and adjacent territory. The ordinances passed in the Boroughs of Pen Argyl, Windgap, Roseto, and East Bangor, although not effective until after July 26, 1913, by reason of their not being published and posted according to law, serve to show that the trend of public sentiment was favorable to the proposed enterprise and that the petitioner was in substance, at least, permitted in the usual authorized way to enter those municipalities to do business.

In pursuance of its charter rights, and its franchise in the Borough of Bangor, and by virtue of the aforesaid situation in the Boroughs of Pen Argyl, Windgap, Roseto, and East Bangor, the petitioner expended over fifty thousand dollars upon its telephone plant before there was any protest filed to restrain its action and prevent it from entering and occupying the territory in question. To refuse the approval of the petition now, after permitting the petitioner to invest that amount of money, would be destroying

a plant investment representing one-half the value of the protestant's property. And it would be doing that although the petitioner in the course of constructing its plant was proceeding, in part at least, entirely within its legal rights.

As there is no power vested in this Commission to restrain the aforesaid petitioner from constructing, maintaining and operating a telephone plant in the Borough of Bangor and other sections of the said company's chartered territory outside of the other boroughs, and inasmuch as such a limited field of population like Bangor and the outlying rural sections would make it impossible to conduct a successful plant in the telephone business and would therefore practically destroy the investment now put into its plant by the said company, it would appear that a just and equitable view of the matter would require the approval of the petition in this proceeding.

The situation at Stroudsburg and in other towns of Monroe County where 975 subscribers of the Stroudsburg and Bushkill Telephone Company will be unable to communicate from their own telephones with Easton, Bethlehem, and other communities within fifty miles of Stroudsburg, if this petition be denied, presents a matter that should be carefully considered in reaching a conclusion in this case. The people of that county have enjoyed the social and commercial advantages of a direct service between those places for years, formerly through the Slate Belt Company, and more recently through the Blue Mountain System. To cut off that privilege now would be imposing an inconvenience and additional expense upon the aforesaid subscribers of that section by forcing all the long distance business by telephone into the hands of the only active competitor, the Bell Telephone Company. In effect the Commission would sanction indirectly the method now employed by a competing concern to establish a monopoly in the telephone business conducted from Stroudsburg and vicinity to the slate regions, and the larger outlying communities like Allentown, Bethlehem, and Easton. The Blue Mountain Telephone & Telegraph Company is the only channel under present conditions through which the aforesaid service can be rendered, and it would therefore cut off all communication between those sections if this Commission were to issue an order restraining the petitioner from entering the territory in which it is seeking to operate. Since the petitioner has already expended upon the construction of its plant

in that territory upwards of \$50,000 and is supplying the only connecting link in the telephone service of a number of communities, the Commission would not be warranted to issue such an order.

There is no reason apparent why the 283,000 and odd independent telephone subscribers in the State who can reach the slate region and who can be reached from that region over the wires of the Blue Mountain Company through present or future traffic arrangement should not be permitted to get that service. The future development of the telephone service will demand that every local community however small shall be given the opportunity to communicate by telephone with the State at large, and the State at large with every local community, whenever circumstances will permit such co-operative service.

In view, therefore, of the foregoing facts and circumstances, the Commission is of the opinion that the petition in this proceeding ought to be approved, and the Certificates of Public Convenience issued accordingly.

#### ORDER.

The Slate Belt Telephone & Telegraph Company having filed a complaint against the Blue Mountain Telephone & Telegraph Company, to which complaint an answer was filed and a hearing held, and the Commission having with the consent of the parties taken up as a result of said complaint, answer and hearing, the applications referred to in the finding and determination in this case, and the said complaint and application having thereafter been duly submitted by the parties and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions on the matter complained of, as well as on the applications mentioned, which report is hereby referred to and made a part hereof:

Now, to-wit, January 8, 1915, it is ordered: That the complaint of the Slate Belt Telephone & Telegraph Company be and the same hereby is dismissed and that the applications of the Blue Mountain Telephone & Telegraph Company mentioned in said report be and the same hereby are approved and the Certificates of Public Convenience directed to issue.

By the Commission,  
FRANK M. WALLACE, *Acting Chairman.*



## PETITION OF LEHIGH NAVIGATION ELECTRIC COMPANY.

*Approval of contracts—What is "contract"—Crossings—Competition—Act of July 26, 1913, Art. III, Sec. 11, P. L. 1395.*

The petitioner asked approval of the Commission (1) for an ordinance of the Borough of Windgap giving it the right to construct its wires across Broadway in said borough, and (2) for the crossing of its wires over those of the Pennsylvania Utilities Co., at the same point. The petitioner has the right under its franchises to supply electric service to Plainfield Township, which is adjacent to said borough, and contends that the crossing asked for is necessary in order for it to serve its patrons there. It further contends that the ordinance does not constitute a contract with the borough under Art. III, Sec. 11, of the Public Service Company Law.

The Pennsylvania Utilities Company, which is engaged in serving the public in the said borough, protests, alleging that after said ordinance has been approved nothing further is necessary to permit the petitioner to serve the public in the borough, that the protestant is already furnishing adequate service at reasonable rates, and that the borough is not large enough to support two competing companies.

*Held:* 1. An ordinance granting a public service company the right to construct its facilities across a street in the municipality, when accepted by the company, constitutes a contract, and, under Art. III, Sec. 11, of the Public Service Company Law, must be approved by the Commission.

2. The borough, having a population of 1,000, is so small that two companies cannot operate profitably there; and the protestant should not be interfered with by a competing company.

3. The ordinance and crossing should be approved on condition that the petitioner do not furnish service to or within the borough.

## MUNICIPAL CONTRACT DOCKET No. 314.

## Report and Order of the Commission.

Submitted October 21, 1914.

Decided January 22, 1915.

*Wm. J. Turner*, for petitioner.

*John R. Geyer*, for protestant.

## COMMISSIONER TONE:

The Lehigh Navigation Electric Company has filed an application for the approval of an ordinance of the Borough of Windgap granting it the right to erect high tension wires over and across Broadway, in said borough. Said crossing also involved the crossing of the facilities of the Pennsylvania Utilities Company.

Notice of the construction of this latter crossing had previously been served by the Lehigh Navigation Electric Company upon the Pennsylvania Utilities Company, October 8, 1914, under this Commission's General Order No. 11, [2 P. C. R. 102] and the Pennsylvania Utilities Company thereupon filed a protest against the approval of the construction of the crossing in which, *inter alia*, the said protestant set forth the fact that the Lehigh Navigation Electric Company had not submitted for the approval of the Commission the ordinance contract between it and the Borough of Windgap, dated September 14, 1914, under which the municipal authority to construct the crossing in question had been obtained. This protest of the Pennsylvania Utilities Company having been filed, the above mentioned petition for the approval of the aforesaid ordinance was presented by the Lehigh Navigation Electric Company to the Commission, and the two cases, the one for the approval of the ordinance contract and the other for the approval of the construction of the contemplated crossing over the facilities of the Pennsylvania Utilities Company, involving as they did, closely related issues for the Commission's determination were heard and considered together. The petition for the approval of the ordinance contract sets forth that the Lehigh Navigation Electric Company is an electric light, heat and power company, organized December 23, 1912, by the consolidation and merger of thirty-eight electric companies, including, *inter alia*, the Excelsior Electric Company of Plainfield Township, incorporated April 4, 1911, for the purpose of supplying light, heat and power by means of electricity to the public in Plainfield Township; that the petitioner has contracted to furnish electric light and power to new shops and yard facilities of the Lehigh and New England Railroad Company in Plainfield Township; has acquired the necessary rights of way thereto for its transmission lines, which are in process of erection; and that to complete the construction of said lines, it is necessary for the same to cross over Broadway street, in Windgap Borough. The petition further states that consent of the borough to the crossing was granted in the exercise of its police power, and it is believed the ordinance is not a contract or agreement with a municipality such as was contemplated by Article III, Section 11, of the Public Service Company Law. The petitioner, therefore asks that such fact be determined

by the Commission, and if the ordinance be considered as a contract subject to the provisions of said Article III, Section 11, that a Certificate of Public Convenience be issued.

The Pennsylvania Utilities Company filed a protest against the approval of said ordinance, stating that the transmission lines proposed to be erected by the petitioner, are for the purpose of providing facilities and serving the public not only in Plainfield Township, but in Windgap Borough, Pen Argyl, Stroudsburg, and East Stroudsburg, communities now served by the protesting company and other utility companies, that there is no necessity for competing service in any of said boroughs and no benefit will result to the public from the same, that the petitioner has a demand and market for its supply of current in the vicinity of its main power plant sufficient to exhaust the amount to be generated at said plant; that it is not necessary for the transmission lines of the petitioner to cross Broadway to reach the Lehigh & New England Railroad Company shops; that the ordinance, the approval of which is petitioned for, in effect grants permission to the petitioner to occupy the streets and highways of the borough, that municipal consent is required therefor, and for either or both of which a Certificate of Public Convenience is necessary; that the consent given by the municipal authorities is intentionally broad enough to permit the petitioning company to contend that it is authorized thereby to do business within the Borough of Windgap, and that it may be contended that the company is required, upon demand, to serve the public in the borough.

Windgap Borough is located in Northampton County, has a width along the north county line of 2,000 feet, extends southerly therefrom about 8,800 feet, where its width is 7,500 feet, and is bounded on its east, south, and west sides by Plainfield Township.

The route of the Lehigh & New England Railroad Company passes through Windgap Borough from west to east about 2,500 feet south of the northerly borough line and crosses at grade one borough street—Broadway, running north and south—at a point about 1,200 feet east of the west borough line. This railroad company has leased to the Lehigh Navigation Electric Company, the petitioner, the right to erect and maintain the poles, towers, and wire transmission lines of the electric company upon and along the right of way and property of the railroad company

through Windgap Borough and certain portions of Plainfield Township. The Lehigh Navigation Electric Company and the Lehigh & New England Railroad Company are both controlled by the Lehigh Coal and Navigation Company.

The ordinance of Windgap Borough provides that no poles or towers be placed upon any borough street. The poles and towers will be erected on and along the right of way secured therefor from the Lehigh & New England Railroad Company. The transmission wires will cross Broadway at an elevation of forty-nine feet above the surface thereof, and sixteen feet above the highest wires now erected along said street.

The Pennsylvania Utilities Company is at present and has been for many years, furnishing electric service to the public in Windgap Borough, which has a population of about 1,000; and the testimony was uncontradicted that the service was adequate and sufficient, that there was no necessity for and no benefit would accrue to the public by another company being authorized to furnish service therein.

The petitioner, claiming that the ordinance under consideration is a grant or license issued under the police power of the borough, raises a question as to its being a contract or agreement between a public service company and a municipal corporation within the purview of Article III, Section 11, of the Act of July 26, 1913. The ordinance is an action of the borough authorities specifically in favor of the petitioning company, and contains provisions that the company file its written acceptance thereof with the borough secretary, file an indemnity bond to protect the borough against any and all claims for damages, reimburse the borough for expenditures made in connection with the preparation and passage of the ordinance, and lastly, pay the borough one hundred and twenty-five dollars per annum. The ordinance has been accepted and the payments therein called for have been made by the company and it clearly constitutes a contract or agreement between a public service company and a municipal corporation within the meaning of Article III, Section 11, of the said act of assembly.

The petitioning company under its charter is authorized to supply electric light and power to the public in Plainfield Township and to persons, partnerships and corporations residing therein or adjacent thereto and for that purpose to erect and maintain the

apparatus necessary therefor, with the right to enter upon any public street or highway, provided that it shall not enter upon the streets of any borough until the consent of the borough council to such entry shall first have been obtained. Counsel for the petitioner maintains that the Borough of Windgap is adjacent to Plainfield Township, and that while it has not contracted so to do, it has the right under its charter to supply electricity to consumers in the borough within a reasonable area therein adjacent to the township.

The petitioner states it is not its intention to furnish service within the borough and it requested "that any certificate that may be granted by the Commission shall distinctly provide that we shall not serve the Borough of Windgap either as a borough or the people in it."

Counsel for the protestant contends that the petitioner having once secured the consent of the borough to an entry upon the streets, needs no further consent from the borough to establish its plant in the borough, and that if it has any corporate right therein, it is then lawfully established in the borough and can be compelled by any individual within the borough to supply service; and that the Commission has no authority to grant it the right to enter and at the same time deny the public the right to secure services if lawfully there. It is not believed that the facilities, property or business of the protestant in Windgap Borough should be in any manner interfered with by the petitioner, and the streets of the Borough of Windgap cannot lawfully be entered upon by the petitioner for the purpose of furnishing service in said borough without further consent of the borough councils to such entry for that purpose and following said municipal consent, the approval thereof by this Commission.

The ordinance grants the petitioner a permit or license to erect its wires over and across Broadway at a particular and specific point. The petitioner has secured a right of way on which to erect its poles, towers and wires through Plainfield Township and Windgap Borough and has undoubtedly the right and authority to erect its facilities on such right of way in the borough up to each side line of Broadway street, and having the consent of the borough to erect the wire crossing over said street and the character of the crossing of the facilities of the Pennsylvania Utilities

Company being proper for the safety and convenience of the public, the Commission is of the opinion that the said ordinance No. 14, of the Borough of Windgap, dated September 14, 1914, should be approved and the crossing as specified in the notice served by the Lehigh Navigation Electric Company upon the Pennsylvania Utilities Company, October 8, 1914, pursuant to General Order No. 11, should be approved and that Certificates of Public Convenience should be issued accordingly, it being expressly understood, however, that the Commission by the issuing of said certificates, or either of them, expresses no approval of the use or occupation of, or entry upon, any of the streets of the said Borough of Windgap by said Lehigh Navigation Electric Company for the purpose of furnishing service to or within the said borough, and an order will be so entered.

#### ORDER.

This case being at issue upon petition and protest filed, and having been duly heard and submitted by the parties and full investigation of the matters and things involved having been had, and at the same time the notice and protest in the case of the crossing of the facilities of the Pennsylvania Utilities Company by the facilities of the Lehigh Navigation Electric Company in the Borough of Windgap having been heard, and submitted by the parties, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

Now, to-wit, January 22, 1915, it is ordered: That a Certificate of Public Convenience be issued, evidencing the Commission's approval of Ordinance No. 74 of the Borough of Windgap, dated September 14, 1914, granting to the Lehigh Navigation Electric Company the right to erect high tension wires over and across Broadway street, in said borough; and also that a Certificate of Public Convenience be issued, evidencing the Commission's approval of the construction of the facilities of the Lehigh Navigation Electric Company across the facilities of the Pennsylvania Utilities Company, in accordance with the notice served upon said Pennsylvania Utilities Company on October 8, 1914; both Certificates of Public Convenience to be subject to the condition

that no approval of the use, occupation or entry upon any of the streets in the said Borough of Windgap by the Lehigh Navigation Electric Company is granted for the purpose of furnishing service to or within said borough.

By the Commission,  
SAM'L W. PENNYPACKER, *Chairman*.

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DANIEL E. BRANDT V. WILLIAM G. LEAS AND THE EAST BERLIN  
RAILROAD CO.

*Duty of public service company—Failure to exercise franchises.*

The charter of a railroad company is not a mere license but is a contract between the State and the company and imposes upon the latter the duty of furnishing service to the public until such time as the charter is surrendered by the company and accepted by the State, or is forfeited and declared void by the State. A company cannot voluntarily discontinue service because its operations are unprofitable.

COMPLAINT DOCKET No. 291.

Report and Order of the Commission.

Submitted October 9, 1914.

Decided January 21, 1915.

COMMISSIONER WALLACE:

Daniel E. Brandt, for himself and other residents of East Berlin, complained to the Commission that William G. Leas and the East Berlin Railroad Company, a corporation, refused to furnish to the public either freight or passenger service over the line of said railway, extending from East Berlin to Berlin Junction, in Adams County, and petitioned the Commission for an order directing either the said Leas or the railroad company to operate the said line of railway in accordance with the terms of its charter.

At the hearing held on the complaint and answer filed it appeared that the line of railway in question began operations in 1876 as the Berlin Branch Railroad Company, incorporated under the Railroad Act of April 4, 1868, [P. L. 62,] and that this operation continued until the 9th of September, 1914. In 1903 the franchises, property and assets of the railroad company were sold by the sheriff of Adams County under foreclosure proceedings and the company was reorganized as the East Berlin Railway Com-

pany, which, on May 1, 1914, defaulted in payment of interest due on bonds issued by it. A receiver was thereupon appointed by the Court of Common Pleas of Adams County and the road and franchise sold by him under an order of court to William G. Leas, one of the respondents in this proceeding. The said Leas, under the authority of the Act of April 8, 1861, [P. L. 259,] caused the corporation to be reorganized under the name of the East Berlin Railroad Company, and that company and its officers, as well as Leas, were made respondents in this case.

From the testimony produced at the hearings it is apparent that the East Berlin Railroad Company and its predecessors have operated this line of railway for a number of years at a financial loss and it is at least doubtful whether the same can be operated at a profit. There is no dispute between the parties as to the fact that the operation has been a financial failure and it is upon this fact that the respondents rely in their contention that the existing corporation has a right to cease operating the line. Their contention is that the company has a right to cease exercising the franchises conferred upon it by the State for the reason that it has found by long experience that these franchises cannot be exercised at a profit, and when the facts were laid before the Commission it became evident that this was the sole question involved in the complaint.

When the Commonwealth originally granted to the incorporators the right to construct and operate a railroad, those corporators acquired certain rights which the Commonwealth does not grant to individuals and with these rights the corporators necessarily assumed certain duties and responsibilities to the State and to the public. These rights are predicated upon a contract between the corporators and their successors and the State that so long as the franchise exists the company will continue to furnish to the public the service contemplated in its charter. The granting of such a charter and the exercising of the rights thereby given did not give to the company a mere license which it can surrender without the consent of the State. When a railroad charter is granted the company secures the right to construct the line mentioned in the charter. When it has exercised that right it enters into a contract with the State to operate the line until such time as the State has authorized it to discontinue the opera-



tion. It is true that the State may look upon a non-user as a forfeiture of the rights granted and proceed to declare the franchise null and void, but until such action is taken by the State the company is bound to perform the service which it undertook when it constructed its line under the powers given it by its charter. The legislature has provided a method by which the company can at any time apply to the State for the right to surrender its charter and franchises and cease to do business. But until either the State has forfeited the charter or the company has surrendered the same, the contract between the State and company must be carried out according to its terms.

As was stated in the case of *Wright v. Railway Company*, 95 Wis. 57: "A public duty is not to be laid down at will. In case of a mere easement, there is but one party interested and he may voluntarily abandon his right, but in case of a public duty, there are two parties beneficially interested—the party who owes the duty and the State to which it is owed. In order to extinguish the duty, there must be concurrence on the part of the State."

In *Gates v. B. and N. A. L. Railway Company*, 53 Conn. 333, the court said: "Having exercised these powers (granted by its charter) the corporation has no right, against the will of the State, to abandon the enterprise, tear up its tracks and sell its rolling stock and other property and divide the proceeds among the stockholders."

The Commission is of the opinion that the respondent, the East Berlin Railroad Company, is bound to furnish reasonably adequate service on its line of railroad from East Berlin to Berlin Junction until such time as the duty imposed upon it by the State shall have been surrendered and the surrender accepted by the Commonwealth. An order will be so drawn.

#### ORDER.

These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

Now, to-wit, January 21, 1915, it is ordered: That the East Berlin Railroad Company shall, on or before the first day of February, 1915, resume service over its line of railway between East Berlin and Berlin Junction, in Adams County, and continue rendering adequate service to the public on said railway from said date until such time as it shall be relieved from that duty in accordance with the laws of this Commonwealth.

By the Commission,  
SAM'L W. PENNYPACKER, *Chairman*.

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## COUNTY COURT OPINIONS.

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PENNSYLVANIA UTILITIES CO. v. LEHIGH NAVIGATION ELEC. CO.

APPEAL FROM PUBLIC SERVICE COMMISSION.

*Public service companies—Competition—Jurisdiction of the Commission—Rights acquired prior to the creation of the Commission—Act of July 26, 1913, Art. III, Sec. 12, P. L. 1395.*

The appellant, a public service company which has been operating for years in a certain locality, asks that the appellee be restrained from operating in the same locality. The appellee is a public service company which was chartered prior to the passage of the Public Service Company Law, with power to operate in the said locality.

*Held:* 1. The Public Service Commission has no authority to restrain the appellee from entering upon the territory described in its charter. To do so would be to disregard the provisions of Art. III, Sec. 12, of the said act, which preserved the rights of companies acquired prior to the passage of the act, and to give the appellant a monopoly to which it is not entitled. The Public Service Company Law was not intended to *prevent* competition between public service companies, but was intended to *regulate* it.

Appeal from Public Service Commission. 75 Commonwealth Docket, 1914. C. P. Dauphin County.

*E. E. Beidleman and Fox & Geyer*, for appellant.

*Wm. J. Turner and W. U. Hensel*, for appellee.

*Wm. N. Trinkle*, for the Commission.  
McCARRELL, J., Feb. 5, 1915:

The record shows that the appellant complained that the respondent was invading territory previously occupied and used by it without having first obtained from the Commission a Certificate of Public Convenience.

The appellee was duly chartered prior to July 26, 1913, as the result of the merger of a number of similar corporations, with express authority to carry on its corporate business in the districts and municipalities from which the appellant asks that it shall be excluded. The Commission holds that it has no power to deny the privilege of exercising charter rights duly conferred by incorporation prior to the approval of the act creating the Commission. The parties were first before the Public Service Commission on the application of the Lehigh Navigation Electric Company for approval of the mechanical device proposed to be used by it for crossing the lines and wires of the Pennsylvania Utilities Company. It was then contended by the Pennsylvania Utilities Company that as the evident purpose of the Lehigh Navigation Electric Company was to reach territory already occupied by the Pennsylvania Utilities Company, the Commission was required to determine whether the public convenience would be promoted by permitting the electric company to enter upon the territory then being served by the utilities company. The Commission being of opinion that it could not properly be required to determine this question upon the application then before it, the utilities company filed the petition upon which this proceeding is based. The prayer of this petition is, *inter alia*, that the Commission after hearing shall "order, decree and direct that the said defendant refrain from invading or attempting to invade the territory already occupied and served by your petitioner and from disturbing and attempting to disturb the business relations already existing or about to be created between the members of the public of that district and your petitioner, and to cease and withdraw all operations in your petitioner's district to the end that the true intent, purpose and effect of the act creating your Commission be carried out." To this petition the respondent demurred for the following reasons:

"(a) That upon the face of the said petition the petitioner is not entitled to the relief claimed.

“(b) That this Commission has no jurisdiction under the provisions of the act approved July 26, 1913, to grant the relief claimed by the petitioner.”

The petitioner, now the appellant, presented its petition upon the theory that it possessed practically a monopoly within the territory occupied and being served by it. Section 12, Article III, of the Act of July 26, 1913, P. L. 1395, declares that “Every public service company shall be entitled to the full enjoyment and exercise of all and every the rights, powers and privileges which it lawfully possesses or might possess at the time of the passage of this act, except as herein otherwise expressly provided.”

The petitioner relies, inter alia, upon Section 2 of Article III, which is as follows: “Upon the approval of the Commission evidenced by its Certificate of Public Convenience first had and obtained, and not otherwise, it shall be lawful for any proposed company,

“(a) To be incorporated, organized or created; Provided, That existing laws relative to the incorporation, organization and creation of such companies shall first have been complied with prior to the application to the Commission for its Certificate of Public Convenience.

“(b) To begin the exercise of any right, power, franchise or privilege under any ordinance, municipal contract, or otherwise.”

Section 11 of Article III provides that “No contract or agreement between any public service company and any municipal corporation shall be valid unless approved by the Commission; Provided, That upon notice to the local authorities concerned any public service company may apply to the Commission before the consent of the local authorities has been obtained, for a declaration by the Commission of the terms and conditions upon which it will grant its approval of such contract or agreement, if at all.”

To have granted the prayer of the petitioner would have been to refuse to the respondent (appellee here) the full enjoyment and exercise of the rights, powers and privileges which it lawfully possessed at the time of the passage of the act creating the Commission, and would have been in disregard of Section 12, Article III. To have held that the respondent was precluded from exercising these rights in territory already occupied by another public service company, although the right to occupy has been duly

granted by charter, would have created practically an exclusive monopoly. Monopolies are opposed to the well settled policy of the law, and are not looked upon with favor either by the courts or the people. As was stated by Chief Justice Gordon in 122 Pa. 175:

"Monopolies are favorites neither with courts nor people. They operate in restraint of competition and are hence, as a rule, detrimental to the public welfare, nor are they at all allowable except where the resultant advantage is in favor of the public; as, for instance, where a water or gas company could not exist except as a monopoly."

We have not been referred to any statutory grant of exclusive privilege to the appellant, or to any of the corporations which have been merged into it. The Act of July 26, 1913, was not intended to prevent competition by public service companies, but was manifestly intended to regulate competition and prevent rates being established by any public service corporation which would be unfair or ruinous. The Commission has authority in every instance where municipal consent is required to approve the ordinance or municipal contract evidencing the consent. It has power to fix the rates charged for the service rendered by the corporation, and thus is enabled to so regulate corporate charges as to prevent competition which would be harmful to the municipality or the public.

We have carefully examined the record in this case, and are satisfied that the Commission reached the proper conclusion when it stated that, "It has no authority to prevent the respondent from entering upon the territory described in its charter, and thus assuming the facts alleged in the petition of the complainant to be true, the complaint ought to be dismissed." We are unable to see that any right of the present appellant has been taken away by the conclusion thus announced, and we therefore dismiss the appeal now pending at the costs of the appellant.

**CITIZENS' ELEC. ILLUMINATING CO. v. CONSUMERS' ELEC. CO. OF  
EXETER.**

*Public Service Commission—Jurisdiction—Appeals from—Certificate of Public Convenience—Deviation from terms of—Act of July 26, 1913, Art. VI, Secs. 6, 9, and 30, P. L. 1422, etc.*

The Court of Common Pleas of Luzerne County will not grant an injunction to restrain a public service company from constructing a crossing of its wires over those of another company contrary to the terms of the Certificate of Public Convenience granted by the Commission. Under Art. VI, Secs. 6, 9, and 30, of the Public Service Company Law, complaint of any violation of an order of the Commission must be made to the Commission, from which an appeal may be taken to the Court of Common Pleas of Dauphin County and thence to the Supreme Court.

Bill for injunction. C. P. Luzerne Co. In equity. No. 3, March Term, 1915.

B. R. Jones, for plaintiff.

STRAUSS, J., January 16, 1915:

The plaintiff seeks to enjoin the defendant from erecting certain lines of wire in the Borough of Exeter and in the Borough of West Pittston.

The plaintiff produces and sells electricity in both these boroughs, and the defendant company proposes to sell electricity in the Borough of Exeter, and for this purpose the defendant is erecting its pole lines.

Preliminary to entering upon the work of construction the defendant obtained from the Public Service Commission a Certificate of Public Convenience, which under the statute had to be obtained before the defendant could "exercise any right, power, franchise, or privilege under any ordinance, municipal contract, or otherwise."

The plaintiff complains that the defendant is constructing facilities and wires across the facilities and wires of the plaintiff without first having obtained the approval of such construction from the Public Service Commission.

It has been shown in the case that the defendant actually obtained permission to build certain crossings by a permit, a copy

of which is attached to the bill, which shows that the Public Service Commission approved certain proposed crossings to be constructed and maintained in accordance with a notice that had been served upon the plaintiff, and in accordance with a plan on file with the Commission, subject to certain conditions mentioned in the permit. The particular crossings complained of now are located at certain intervals between crossings shown upon the plan which was filed with the Public Service Commission, and which shows a proposed connected construction of lines throughout the territory. The plaintiff contends that the form of the application authorized the defendant company to build only the crossings named in the written notice and did not authorize the defendant to construct lines of wires connecting with its wires at said crossing.

It was admitted that the Public Service Commission, before issuing its Certificate of Public Convenience and approval of the crossings according to the plan, had sent its own engineer upon the ground and had obtained from him a report concerning the proposed construction, after which the certificate was issued to the defendant.

The plaintiff's contention now is that every cross-bar and private service wire belonging to the plaintiff or connected with its lines, which in the course of construction will be crossed by the defendant's wire, ought to have been mentioned in the original application for the Public Service Commission's consent, and that the failure to mention it of necessity compels interruption of the work at the point where such particular facility not mentioned in the original application may happen to be located.

It may be that this is what the Public Service Commission intended, but an examination of the Act of July 26, 1913, Art. VI., Sec. 9, leads us to the conclusion that it was not contemplated that the action of the Public Service Commission, in matters of this character, should be subjected to litigation in the courts until the Commission itself may have had an opportunity to correct or make clear its own certificates and permits. In all such cases it seems to us, Section 6 and 9, Article VI., of the act, established the jurisdiction of the Commission at least in the preliminary steps in any litigation that may ensue in conse-

quence of a claim of authority by a public service company under permit from the Public Service Commission.

Section 6 provides that: "Any person or corporation, public service company, or municipality complaining of anything done or about to be done, omitted or about to be omitted by any public service company in violation of any of the requirements or provisions of this act, or of any lawful determination, ruling or order of the Commission, may apply to the Commission by petition duly verified by the affidavit of the complainant which shall contain a concise statement of all the material facts upon which the complaint is founded."

After providing for the procedure upon such a petition, Section 9 enacts: "Where any petition complains as aforesaid of any violation of any lawful determination, ruling or order of the Commission (to be made as hereinafter provided) and it appears to the Commission that reasonable ground exists for investigating said complaint and a hearing or investigation is had upon said complaint, the burden of proof shall be upon the public service company complained against to show that the determination, ruling or order of the Commission has been complied with."

By other provisions in this article the Commission is required to make and file written finding, determination or order in all hearings or investigations of this character; and by Section 17, an appeal from the action of the Commission is allowed to the Court of Common Pleas of Dauphin County.

It therefore seems to us to be certain that the purpose of the legislature was to create a system of single and concentrated supervision in the Public Service Commission over actions taken by public service companies under their several charters and permits obtained from the Public Service Commission, subject to judicial control only upon appeal by the Court of Common Pleas of Dauphin County, and under Article VI, Section 30, of the Supreme Court.

To open the doors of litigation on these orders of the Public Service Commission in every judicial district of the Commonwealth, might lead to endless confusion in practice and might impose upon the Public Service Commission, whose duty it is to produce an effective administration of this new statute, such burden of defending decrees and determinations in the several courts



of Common Pleas of the Commonwealth as might leave them but little time for the performance of the essential duties of their office. Because the jurisdiction over contests of this character seems to us to be vested in the Public Service Commission, the Court of Common Pleas of Dauphin County, and the Supreme Court of the State, we must refuse to award this injunction and suggest that the application be made by complaint in the tribunal specially established for this class of litigation.

Now, January 16, 1915, an application for a preliminary injunction is refused. Upon motion of plaintiff's counsel an exception is noted.

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COMMONWEALTH V. THE INDUSTRIAL COLD STORAGE & WAREHOUSE CO.

*Tax on capital stock—Manufacturing companies—Exemption of—Cold storage company—Act of June 8, 1893, P. L. 353.*

A corporation which was organized for the purpose of conducting a cold storage and warehouse business and which manufactures ice only as a means of reducing the temperature of its cold storage rooms, is not a manufacturing company, and is not entitled to the exemption from tax on capital stock allowed by the proviso of the Act of June 8, 1893, P. L. 353.

Appeal from settlement of tax on capital stock. C. P. Dauphin County. Nos. 31, 32, and 382 Commonwealth Docket, 1911.

*Wm. M. Hargest*, Asst. Deputy Attorney General, for the Commonwealth.

*Olmsted & Stamm*, for defendant.

KUNKEL, P. J., Feb. 13, 1915:

These are appeals by the defendant from settlements made against it by the accounting officers of the Commonwealth for tax on its capital stock for the years 1906, 1907, and 1908. By agreement of the parties they have been consolidated to No. 31 Commonwealth Docket, 1911, and submitted to us for trial without the intervention of a jury pursuant to the provisions of the Act of April 22, 1874. We find the facts to be as follows:

FACTS.

The defendant company was formed and incorporated in 1905,

under the laws of this State, "for the purpose of carrying on and conducting a cold storage and warehouse business." Its building or plant is located in the City of Philadelphia, and is equipped with all the necessary machinery and appliances for making ice and for producing artificial refrigeration. It is engaged in the business of supplying to its customers cold storage space in its building by means of ice, which it makes by artificially freezing water in cans, and which it furnishes for that purpose. However, during the years covered by these settlements it made no ice in cans, but supplied its customers with cold storage by artificial refrigeration, which it produced, as stated by its general manager: "In making ice for refrigerating purposes practically the same process is used (the process referred to being that of making ice in cans theretofore referred to in his affidavit), except that coils of pipe are placed around the sides of the room and ammonia or calcium solution is circulated through the coils under pressure from powerful hydraulic pumps. A thick coating of ice forms on the coils, thus extracting the heat units from the atmosphere of the room and lowering the temperature to the desired point. Any temperature wanted can be obtained by raising or lowering the temperature of the solution before leaving the coolers and increasing or decreasing the speed of the pumps." The defendant's whole capital stock, of the value of \$325,000, is invested in its plant and business. On November 23, 1910, the accounting officers settled an account against it for tax on its capital stock for the year 1908, charging it with the sum of \$1,625. On January 6, 1911, they settled two other accounts against it for tax on its capital stock for the years 1906 and 1907, charging it for each year with the sum of \$1,625. From these several settlements it duly appealed.

#### DISCUSSION.

The defendant company claims that it is a manufacturing corporation and its entire capital stock is exempt from taxation under the proviso in Section 1 of the Act of June 8, 1893, P. L. 353. It puts its claim upon the ground that it was engaged in manufacturing ice for use in carrying on its corporate business and that its capital was so employed in the years for which the taxes are here charged. The ice which it thus claims to have

manufactured was the hoar frost or ice that gathered upon the coils used in connection with its machinery during the process of refrigeration, and which resulted from the congelation of the moisture in the atmosphere in the rooms which it undertook to make cold. It is quite manifest that this ice was not the purposed product of the operation, but was purely an incidental result thereof, or at most the means by which the defendant accomplished its corporate object. Its business is to furnish cold storage. It does this by artificial refrigeration, and for this purpose it was incorporated. The operation of its plant can in no wise be considered carrying on manufacturing. What it does with its appliances, chemical solutions and machinery, is to lower the temperature of the rooms which it provides for the storing of the perishable commodities belonging to those with whom it transacts business. It is quite clear that it is not a manufacturing company. It was not organized for manufacturing purposes and therefore does not fall within the class of corporations to which the exemption is afforded. It is what is commonly known as a cold storage company. It was not engaged in manufacturing, nor was its capital stock so employed, during the years in question within the meaning of the statutory exemption.

#### CONCLUSIONS.

We therefore conclude:

1. That the defendant company is not exempt under the proviso to Section 1 of the Act of June 8, 1893, P. L. 353, from the capital stock tax charged against it in the settlements appealed from.
2. That it is liable for the capital stock tax as charged in the settlements.
3. That the Commonwealth is entitled to recover as follows: Capital stock tax, interest, and commissions, \$6,337.30, for which sum judgment is directed to be entered in favor of the Commonwealth and against the defendant, unless exceptions be filed within the time limited by law.

## COMMONWEALTH V. JOHN T. DYER QUARRY CO.

*Tax on capital stock—Manufacturing companies—Exemption of—Quarrying and crushing stone—Acts of June 8, 1893, P. L. 353, and June 7, 1911, P. L. 673.*

A corporation which is organized for the purpose of "quarrying, crushing, preparing and marketing stone" and in the conduct of its business merely takes the stone from the quarries, crushes it, and assorts the product according to its sizes, without the application thereto of any art, skill or process which changes the appearance or form of the product or results in the production of a new or different article, is not a "manufacturing company" and is not entitled to the exemption from tax on capital stock which is allowed by Acts of June 8, 1893, P. L. 253, and June 7, 1911, P. L. 673.

Appeal from settlement of capital stock tax. C. P. Dauphin County. No. 30 Commonwealth Docket, 1914.

*Wm. M. Hargest*, Asst. Deputy Attorney General, for the Commonwealth.

*Olmsted & Stamm*, for defendant.

MCCARRELL, J., Feb. 17, 1915:

The defendant asks exemption for its capital employed in crushing stone, claiming that it is a manufacturing company and that its capital is employed exclusively in manufacturing. Trial by jury has been duly waived in pursuance of the Act of April 22, 1874. From the testimony submitted we find the following:

## STATEMENT OF FACTS.

Defendant company was formed and incorporated December 27, 1900, for the purpose of "quarrying, crushing, preparing and marketing stone." The valuation of its capital stock as made by its officers is \$464,600. Of this there was invested in shares of other Pennsylvania corporations paying tax on capital stock the sum of \$16,600, leaving as the valuation of its stock for the year 1912, \$448,000. Upon this amount a tax of \$2,240 was settled September 9, 1913. On account of this settlement the defendant paid on November 6, 1913, \$250. The defendant claims that it is exempt as a manufacturing company actually using its capital in carrying on the business of manufacturing. Is the defendant entitled to this exemption? This is the sole question to be determined here.

## DISCUSSION.

The exemption from taxation is claimed under the revenue Act of June 1, 1889, amended by Act of June 8, 1893, P. L. 353, and Act of June 7, 1911, P. L. 673. This act in its twenty-first section imposes a tax of five mills upon each dollar of the actual value of the entire capital stock of every corporation, joint stock association, limited partnership and company doing business in the State. It stipulates, however, "That the provisions of this section shall not apply to the taxation of the capital stock of corporations, limited partnerships and joint stock associations organized for manufacturing purposes which is invested in and actually and exclusively employed in carrying on manufacturing within the State, . . . but every manufacturing corporation, limited partnership or joint stock association shall pay the tax of five mills herein provided upon such proportion of its capital stock, if any, as may be invested in any property or business not strictly incident and appurtenant to its manufacturing business, it being the object of this proviso to relieve from State taxation only so much of the capital stock as is invested purely in the manufacturing plant and business." The corporation claiming exemption under this proviso must show as conditions precedent to the allowance of the exemption that it is,

(a) Organized for manufacturing purposes, and

(b) That its capital is actually and exclusively employed in carrying on manufacturing within the State.

The defendant company does not in terms appear to have been organized for manufacturing purposes. Its corporate purpose is stated to be "Quarrying, crushing, preparing and marketing stone." Although it is not expressly declared to be a manufacturing company it may be so in fact if its business is actually that of manufacturing. Whether this is so or not will depend upon what it does in the carrying on of its business. Quarrying is not manufacturing, neither is crushing in and of itself a manufacturing process, unless it results in the production of a new and different article. Marketing stone is certainly not manufacturing. Whether preparing stone is to be so regarded as manufacturing depends upon the method and result of the preparation. The testimony of its treasurer submitted at the trial thus defines the method and result of the preparation made by the company:

"The company takes the raw material consisting of rock and stone from the quarries and carries it by hand or machinery to large crushers, which crush the stone into smaller sizes. This crushed stone is carried by belts or conductors to large screens where it is assorted, the different sizes going into different bins, and that which is not in condition to pass through the screen goes into another bin whence it is taken back to the crusher and again re-crushed to a marketable size. The company has six plants located at Marysville, Howellsville, Birdsboro and Clingan, Pennsylvania, and has a capacity of 4,500 tons of manufactured product per day. In its manufacturing operations it employs eighteen crushers with the necessary boilers, engines, elevators, screens, storage bins, etc., necessary for the" preparation of the stone for marketing.

This testimony is the statement of the defendant company as to the processes employed by it in preparing stone for the market. While it has extensive machinery, it is used only for the breaking of the stone or rock into the sizes required for the different purposes for which the stone is afterwards used. If the breaking of the stone into these sizes was performed, as it could be by the manual labor of men wielding hammers and breaking the stone into the required sizes, it could scarcely be pretended that this is manufacturing. The machinery employed doubtless crushes the stone much more rapidly and economically than it could be done by men wielding hammers, and the sorting of the sizes is accomplished by running the crushed stone over screens with different sized mesh and permitting the stone of the varying sizes to fall into the underlying bins. There does not seem to be any attempt to make the sizes of the stone into which the rock is crushed of any uniform shape. The pieces as they fall from the crusher are sold in the market without the application thereto of any art, skill or process which in any way changes the appearance or the form of the portions as they leave the crusher. The processes of this defendant seem to be entirely different from those of a slate company, which splits the slate rock into pieces and produces therefrom shingles, slates, polished slabs for wainscoting and other purposes, and slate fashioned for various uses to which slate is adapted. The irregular pieces as they fall from the crusher are sold in that condition without any attempt on the part

of the defendant company to remove the rough, irregular edges or in any way fashion these portions so as to give them a uniform appearance. The employment of the process and the use of the machinery is solely for the purpose of breaking the stone into pieces of various sizes. The rock still remains rock or stone. The only difference is in the sizes of the portions, and in this natural condition without the application of any art or process to change the form or appearance of the broken pieces the same are sold by the defendant company in the market. The term "manufacturing" has been defined in many different ways by lexicographers and has been considered judicially in many cases.

In the case of *Hartranft v. Wiegmann*, 121 U. S. 609, the Supreme Court of the United States uses the following language:

"The question is whether cleaning off the outer layer of the shell by acid and then grinding off the second layer by an emery wheel so as to expose the inner layer is a manufacture of the shell, the object of these manipulations being simply for the purpose of ornament and some of the shells being afterwards etched by acids so as to produce inscriptions upon them. It appears . . . that there is no difference in name and use between the shells ground on the emery wheel and those not ground. . . . We are of opinion that the shells in question here were not manufactured and were not manufacturers of shells within the sense of the statute imposing a duty of thirty-five per centum upon such manufacturers but were shells not manufactured and fell under that designation on the free list. They were still shells. They had not been manufactured into a new and different article having a distinctive name, character or use from that of a shell. The application of labor to an article either by hand or mechanism does not make the article necessarily a manufactured article within the meaning of the term as used in the tariff laws. Washing and scouring wool does not make the resulting wool a manufacture of wool. Cleaning and ginning cotton does not make the resulting cotton a manufacture of cotton."

Counsel for defendant refers us to many cases decided by this court in which it was decided that manufacturing had been per-

formed: The dyeing of woolen and cotton goods (5 Pa. C. C. 94); the making of hams, sides, bacons, etc., from hogs (3 Commonwealth Docket, 1896); the production of sole leather by tanning hides (598 Commonwealth Docket, 1896); converting coal into coke (490 June Term, 1892); converting whole spices and mustard seed into saleable mustard, spices and condiments (306 January Term, 1892); changing clay into brick by tempering, moulding and burning (335 January Term, 1893); quarrying large blocks of slate, splitting them into pieces of varying thickness, sizing, dressing and preparing for roofing, door steps, lintels, school slates and kitchen utensils (158 January Term, 1887), are all cases in which by some art or process a different product has been produced than that upon which the art or process was expended. Many other cases have been considered and might be here cited. Among these is the late case of *Commonwealth v. Consolidated Dressed Beef Company*, 242 Pa. 163. This case very nearly resembles the one we now have under consideration. After the application of defendant's machinery the product still remains stone, broken into sizes to meet the demands of the market. It is still stone, bearing the appearance of stone, with no regular shape or fixed size in the portions which are sold just as they come from the crushers without any attempt to remove the irregularities of the edges or make the pieces of uniform shape. In our opinion this is not manufacturing within the meaning of our statute.

We therefore have reached the following conclusions:

1. The defendant company is not incorporated for manufacturing purposes.
2. The defendant company is not employing its capital actually and exclusively in the carrying on of manufacturing within the State and is not entitled to the exemption allowed by the Acts of June 8, 1893, P. L. 353, and June 7, 1911, P. L. 673.
3. The Commonwealth is therefore entitled to recover the amount of its settlement, with interest and attorney general's commission, less the sum paid on account, to-wit, \$2,250.05.

Judgment is therefore now directed to be entered in favor of the Commonwealth and against the defendant for the sum of \$2,250.05, unless exceptions be filed within the time limited by law.



## COMMONWEALTH V. BELLEFONTE LIME COMPANY.

*Tax on capital stock—Manufacturing companies—Exemption of  
—Making railroad ballast—Acts of June 8, 1893, P. L. 353,  
and June 7, 1911, P. L. 673.*

A corporation engaged in crushing limestone and assorting from the crushed rock the pieces of specified size for use as railroad ballast without applying thereto any art or process to change the form or appearance of the rock, or to produce a new or different article, is not engaged in manufacturing and is not entitled to the exemption from tax on capital stock which is allowed by the Acts of June 8, 1893, P. L. 353, and June 7, 1911, P. L. 673.

Appeal from settlement of tax on capital stock. C. P. Dauphin County. No. 166 Commonwealth Docket, 1913.

*Wm. M. Hargest*, Second Deputy Attorney General, for the Commonwealth.

*C. B. Miller*, for defendant.

McCARRELL, J., Feb. 17, 1915:

The defendant claims that it is a manufacturing company and that under the law, its capital being employed exclusively in manufacturing, is exempt from the payment of a capital stock tax. Trial by jury has been duly waived in pursuance of the Act of April 22, 1874. From the testimony submitted we find the following:

## STATEMENT OF FACTS.

The defendant company was formed and incorporated April 13, 1910, for the purpose of manufacturing and selling lime, cement, lime stone, and the products thereof. Its capital stock has been valued by the accounting officers of the State at \$50,000, and in the appeal there is no specification of objection to this valuation. On September 18, 1913, the accounting officers of the Commonwealth settled a tax of five mills upon this valuation, amounting to \$250. The defendant claims that it is exempt as a manufacturing company actually using its capital in carrying on the business of manufacturing. Is the defendant entitled to this exemption? This is the sole question to be determined here.

## DISCUSSION.

The exemption from taxation is claimed under the revenue act of June 1, 1889, amended by Act of June 8, 1893, P. L. 353, and Act of June 7, 1911, P. L. 673. This act by the proviso contained therein exempts from the payment of the capital stock tax imposed by the act corporations organized for manufacturing purposes and actually and exclusively employing their capital in carrying on manufacturing within the State. From the testimony of the officers of the company submitted in the form of an affidavit by the president and treasurer, it appears that the process of manufacturing employed by the defendant company is the crushing by the means of machinery of large pieces of lime stone as they come from the quarries. After crushing the large material the pieces of stone which are of a uniform definite size and having a diameter of not more than two and three-fourths inches and not less than three-fourths of an inch, are separated by mechanical contrivance for the manufacture of crushed stone and are given the distinctive name of railroad ballast, and as such is a new and distinctive article, having a new and definite use. The mass of crushed stone which does not conform to specifications as to size is carried away and becomes a waste product. The statement of the corporate purpose does not of itself clearly indicate that the defendant company was formed and incorporated for manufacturing purposes. The method of carrying on the business as testified to by the president and treasurer clearly shows that the corporate business is conducted in substantially the same way as that of the John T. Dyer Quarry Company, Commonwealth Docket, 1914, No. 30, [see preceding case,] in which we this day file our opinion. For the reasons stated in said opinion, which we direct shall be regarded as our opinion in the present case, we are not satisfied that the defendant company was organized for manufacturing purposes or that its capital is actually and exclusively employed in carrying on manufacturing. It is engaged in breaking stone by means of machinery into portions of varying sizes, and does not by any art or process attempt to remove the rough, irregular edges of the pieces, or in any way fashion them so as to give them a uniform appearance. The broken rock still continues to be rock or stone and is in no way

changed in form or appearance. For the reasons stated in our opinion in the case just referred to, we conclude as follows:

1. The defendant company is not incorporated for manufacturing purposes.

2. The defendant company is not employing its capital actually and exclusively in the carrying on of manufacturing within the State and is not entitled to the exemption allowed by the Acts of June 8, 1893, P. L. 353, and June 7, 1911, P. L. 673.

3. The Commonwealth is therefore entitled to recover the amount of its settlement, with interest and attorney general's commission, to wit, \$282.19.

Judgment is therefore now directed to be entered in favor of the Commonwealth and against the defendant for the sum of \$282.19, unless exceptions be filed within the time limited by law.

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LOCOMOBILE CO. OF AMERICA V. MALONE.

*Foreign corporations—Registration—Service of process—Act of June 8, 1911, P. L. 710.*

The Act of June 8, 1911, P. L. 710, repealed the Act of April 22, 1874, P. L. 108, and limited the provisions of Art. XVI, Sec. 5, of the Constitution, so that a foreign corporation doing business in this State need have only one authorized registered agent in the State.

Motion for judgment. C. P. Allegheny County. 1914, No. 2281.

*Evans, Noble & Evans*, for plaintiff.

*George M. Hosack*, for defendant.

KENNEDY, J., Dec. 19, 1914:

This is a motion by the defendant for judgment on the pleadings.

The plaintiff, a foreign corporation, doing business in Pittsburgh, claims of the defendant the sum of \$899.62 for work and material furnished.

The defendant admits owing \$169.15, which amount he has paid the plaintiff since suit was brought, but denies further in-

debtedness, and in addition denies the right of the plaintiff to recover in this action because it has not registered with the secretary of the Commonwealth a statement and the location of its agency in Pittsburgh, and avers that Art. XVI, Sec. 5, of the Constitution, which provides that "No foreign corporation shall do any business in this State without having one or more known places of business and an authorized agent or agents in the same, upon whom process may be served," requires an agency upon whom process can be served in each place of business in the State. It is admitted that the plaintiff has a registered agency in Philadelphia. We are not convinced that the clause demands the interpretation placed upon it by defendant. We are aware that the cases cited by defendant—*Phoenix Silk Mfg. Co. v. Reilly*, 187 Pa. 526, and *Hagerman v. Empire Slate Co.*, 97 Pa. 534, are open to that construction, but they are based not only upon Art. XVI, Sec. 5, of the Constitution, but mainly upon the Act of April 22, 1874, P. L. 108, which did require an authorized registered agent in each place, of business. This act, however, was repealed by the Act of June 8, 1911, P. L. 710, which provides that a foreign corporation shall have but one authorized registered agent in the State. The Constitution requires the plaintiff to have one (or more) known places of business and an authorized agent (or agents) in the same upon whom process may be served. Inasmuch as the legislature has seen fit to so limit the language of this clause that under it one agent is sufficient and that service upon him may be made through the secretary of the Commonwealth of any process issued by any court, magistrate or justice of the peace having jurisdiction of the subject matter in any county where the right of action arises, we are, unless such construction is clearly repugnant to the clause quoted, bound thereby, and therefore the motion of the defendant for judgment on the pleadings is dismissed and rule discharged.

LEHIGH VALLEY COAL COMPANY *v.* BELL TELEPHONE COMPANY  
OF PENNSYLVANIA.

COMPLAINT DOCKET NO. 264.

Filed July 31, 1914.

Decided March 3, 1915.

KELLEY BROTHERS COAL COMPANY *v.* BELL TELEPHONE COM-  
PANY OF PENNSYLVANIA.

COMPLAINT DOCKET NO. 270.

Filed August 20, 1914.

Decided March 3, 1915.

*Telephone companies—Rates—Service—Discrimination.*

Complainants alleged that respondent refused to furnish telephone service except at rates which are higher than the rates heretofore paid, and that the higher rates are practically prohibitive. The testimony showed that the complainants are located at the end of a line twenty-one miles from the respondent's exchange, in a small community already served by another company, that the line over which service has been rendered is antiquated and in such bad condition that it can no longer be safely operated, that to replace the line would involve an expense of from \$2,000 to \$8,000, and that there is little likelihood of securing other subscribers in the community.

*Held:* The respondent must charge the same rates for service here as are charged by it for similar service elsewhere under similar circumstances and conditions. To charge a lower rate merely because a prior rate based upon an antiquated and inferior service had been in effect, would discriminate against other localities similarly situated.

Report and Order of the Commission.

COMMISSIONER BRECHT:

The complainants in this proceeding are located near Snow Shoe, Pennsylvania, and have been subscribers of the Bell Telephone Company for a number of years. In the complaint of Kelley Brothers Coal Company, it is alleged that respondent refused to install a telephone station in the new office of complainant although requested so to do several times since November, 1913. The complaint of the Lehigh Valley Coal Company sets forth that for twenty years or more complainant has received "service from the Bell Telephone Company and its prede-

cessors.....at an annual rental of \$48.00;" that in 1911 notice was served upon complainant that service at the old rates would be discontinued and that higher rates would be charged for service thereafter, which were not accepted; that as a result of this proposition and its refusal the Lehigh Valley Coal Company was advised by respondent "under date of July 13, 1914, that service would be discontinued at Snow Shoe after August 15th" following; that the terms of the several propositions submitted were prohibitive; and that the service at Snow Shoe cannot be put upon a new basis of rates or arbitrarily discontinued because the patronage of the respondent has been permitted to dwindle to a few subscribers.

It is held by respondent that its line between Bellefonte and Snow Shoe is now and has been for some time in so precarious a condition "that it may go down at any time," and, therefore, urgently needs rebuilding, that it pays to the Pennsylvania Railroad Company for pole attachments on that line a rental of \$85.80 per year, that its total annual revenue for toll service and rental derived from its sole subscriber on that line amounts only to \$61.42, that the old rates are below the standard rates charged everywhere else and, therefore, discriminatory and prohibited by law, and finally that in order that satisfactory standard telephone service may be given at Snow Shoe at any price it would be necessary to proceed at once to "construct a pole line and copper circuit for a distance of nineteen miles over the mountain."

By agreement between all parties in interest these two complaints, since they involved substantially the same point, were merged into and considered as one complaint at the hearing held before the Commission on January 7, 1915.

Snow Shoe, as appears from the record, lies twelve and one-quarter miles by air line and twenty-one and three-quarters miles by telephone route northwest of Bellefonte. It is connected with the Bellefonte exchange of the Bell Telephone Company by a "single wire grounded circuit." From a point a little more than fourteen miles distant from Snow Shoe the line into that borough is an iron wire and is attached to the poles of the Pennsylvania Railroad Company, for which attachment the telephone company pays an annual rental of \$85.80, or an average of \$6.00 per mile.

This wire was installed in 1881 and is the only case of a "grounded wire" in use in the entire Harrisburg district of the respondent, which includes two counties in the State of New Jersey and all that portion of Pennsylvania lying between Easton, Scranton, Altoona and the State line on the south.

The usual length of service of an iron wire is from ten to fifteen years, and as this particular line has been in place for a period of thirty-three years, the wire, according to the testimony offered, has deteriorated to about one-half to three-fourths of its original size. Its corroded condition has greatly impaired its efficiency for transmission purposes and has so weakened its strength that it has been found necessary to make as many as five repair connections between two successive poles. Furthermore, the general condition of the wire is such that respondent received two letters from the railroad company in 1914 stating that through breaks along the line the aforesaid wire was interfering with the circuit of its own wires. This situation always proves to be a serious matter, as the railroad company is operating its trains by telephone communication and every such interference will throw its signals out of service.

It was the opinion of the superintendent of the Harrisburg Division of respondent's lines that the condition of the line to Snow Shoe is so badly corroded and out of repair that service over that route must be at once discontinued. In that event the iron wire would have to be replaced with a copper metallic circuit line over a distance of fourteen miles; and if the railroad company should not allow the use of its poles a new pole line for that distance would also have to be erected. This change, it is estimated, would involve an additional outlay for plant equipment of from \$2,000 to \$8,000, accordingly as either plan would be adopted.

It would seem reasonable to contend that before the telephone company should be required to assume that additional burden there should be in sight, to warrant the expenditure a reasonable return upon the investment after due effort has been made to secure and develop business. It is alleged by respondent that after making a careful canvass of the field at different times it failed to obtain bona fide subscribers or even assurances from

prospective subscribers sufficient in number to justify the reconstruction of the line. Under such circumstances about the only alternative respondent could select is to put into effect the rates published in its tariffs which are established everywhere else where similar conditions prevail.

Prior to the hearing held on the matter respondent, under the impression that the Lehigh Valley Coal Company desired only individual rates submitted two propositions for that kind of service. These were regarded at the time as prohibitive and would not be entertained by that company. Upon the suggestion of the Commission, with a view of reaching a settlement in the matter, an offer was made at the hearing by respondent to submit the standard published rates for all kinds of service furnished by the Bell Telephone Company, individual line, two-party line, four-party line, multi-party line and private toll station service, to complainants permitting them to select whichever would best suit their purpose and convenience.

Accordingly, under date of January 11th, 1915, the telephone company submitted for complainant's consideration propositions and rates for service at Snow Shoe, in connection with its Bellefonte central office service, as follows:

(1) Individual flat service for \$261.00 per annum, made up of a flat rate service of \$36.00 per annum, and the usual exchange mileage beyond the base rate area of \$5 per quarter mile, or fraction thereof;

(2) Two-party line service (not now filed for Bellefonte service), to meet the particular needs and convenience of complainants for \$171 per annum, made up on a flat rate and line mileage basis;

(3) Four-party line service for \$114.00 per annum, provided three other subscribers are secured;

(4) Private toll station service individual line, under a guarantee of \$49.00 per month, for \$588.00 per annum;

(5) Multi-party line service business for \$24.00 per annum, residence \$18.00 per annum. Under the requirements of this tariff it would be necessary for respondent to have a total of fifty-seven (57) subscribers.

No communication has been received by the Commission from



either party to this proceeding indicating that any of the aforesaid terms and propositions have been accepted by complainants.

Snow Shoe and Clarence are the two communities that practically comprise the whole population of the territory embraced in this proceeding. The population of Snow Shoe is said to be 643 and of Clarence 250. Within this territory of rather limited population a competing telephone company is maintaining and operating an exchange, with a patronage of eighty-one subscribers, as testified to by one of complainant's witnesses. It would, therefore, not seem very probable under present conditions that the most thorough and diligent canvass would enable respondent to procure from fifty to sixty new subscribers in that district. And yet, unless such number can be obtained, there must be a radical change in the old rates collected from complainants if the telephone company does not wish to lay itself open to the charge of maintaining unjustly discriminatory rates in that territory. The published tariffs of the company must apply here the same as elsewhere.

In September, 1914, the chief telephone inspector of the Commission was directed to make a careful investigation of the condition of respondent's telephone plant at Snow Shoe and report the result of his ascertainment to the Commission at its next meeting. After a thorough inspection of the situation in question, the inspector advised against granting the petition of complainants. In the report filed by him, he recommended, *inter alia*, that:

"Careful consideration leads to the conclusion that the interests of the parties to this case, as well as the general public who patronize the service to Snow Shoe from points outside thereof, would be best served by eliminating the existing antiquated lines and obsolete equipment and methods now in use, and substituting in lieu thereof lines and equipment of the universal standard (type) and at the standard classified rates for such service."

The precarious condition of respondent's line, the obsolete character of the "grounded circuit" still in use, and the not infrequent interruptions of the wires of the railroad company due directly to breaks upon the telephone line indicate that the present iron wire line has outlived its normal life and should be replaced

before further service is offered to the public over that route. When that reconstruction is made there is no assurance given now that the poles of the railroad company may be used to make the attachment of the telephone equipment. Should that privilege be denied to respondent a new line of poles will have to be erected over a distance of fourteen miles.

In rebuilding the line it would not be in keeping with modern business methods to install a duplicate of the old line. Respondent could not be expected to put again into service an "iron wire grounded circuit." A system so primitive and obsolete would have to give way to the modern copper metallic circuit that is now practically in use throughout the country. This change in the construction of the plant would involve a larger expenditure for plant equipment, and necessarily would require a higher service charge for operation and maintenance. It would, therefore, be subversive of a fundamental principle of business economy to require the same rates for an adequate modern equipment and service that is now charged for a system that was installed over thirty years ago and has been shown to be worn out for the purpose for which it was constructed.

Moreover, to allow an obsolete or exceptionally low rate to be given to one party and not extend the same privilege to others would be showing an unjust discrimination in the matter of rates under similar circumstances and conditions which is expressly prohibited by provisions of the act under which public service corporations are regulated. The fact that the privilege had been accorded for a number of years under different circumstances to any one does not furnish any valid reason for continuing such rates when the old order of things has been done away with and a new and later type of equipment installed instead. Under the act no lower rate can be granted to any one simply because he has been a subscriber for a number of years under conditions which the evolution of the business has outgrown.

In an opinion handed down January 5, 1914, in the case of *Commonwealth ex rel. McIver v. Central District Telephone Company*,\* on the right of a telephone company to terminate a one-year contract after the first year, the Supreme Court of

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\*243 Pa. 586.

Pennsylvania held that "the company could terminate" the contract "by giving reasonable notice," but could not "annul the contract arbitrarily and refuse all service to the relator; for . . . . . under general principles of law, the company was obliged to render her the same service under like terms that it gave to other persons similarly situated, which the answer states it is and always has been ready to do." In the case before us, the respondent holds itself ready to furnish service to complainants at the same rates and upon the same terms that it gives to other persons similarly situated.

The petition of complainants is accordingly refused and the case dismissed.

#### ORDER.

These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, submitted and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

Now, to wit, March 3, 1915, *It is ordered*, that the complaints in these proceedings be and they are hereby dismissed.

By the Commission,

SAMUEL W. PENNYPACKER, *Chairman*.

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#### DEXTER PORTLAND CEMENT COMPANY, ET AL., v. THE LEHIGH VALLEY RAILROAD COMPANY, ET AL.

##### *Adjustment of rates on cement.*

Complainants alleged that the adjustment of rates on cement from the Nazareth, New Jersey, and Lehigh districts to Easton, Bethlehem, and Allentown, was unreasonable.

*Held:* 1. The rate from the Nazareth district to Easton, which is ten cents per ton higher than the rate from the Lehigh district to Easton, is reasonable, as the former involves a joint service while the latter is a one-line haul.

2. The joint rate from Nazareth to Allentown should be reduced ten cents per ton.

## COMPLAINT DOCKET No. 230.

Filed June 9, 1914.

Decided March 4, 1915.

## Report and Order of the Commission.

## COMMISSIONER JOHNSON:

This case is brought by six cement manufacturing companies having plants near Nazareth, Pa., the complaint being that rates on cement from Nazareth to Easton, Bethlehem, and Allentown are unduly high in comparison with the rates to the same markets from other cement-producing districts.

Prior to September 27, 1909, the cement rates from Nazareth to Easton were, for several years, fifty cents per ton of 2,000 pounds, and the rates to Bethlehem and Allentown were sixty cents per ton, with the exception of the local rate via the Lehigh and New England Railroad to Bethlehem, which was fifty cents per ton. Upon that date, the rate to Easton was raised to sixty cents, no change being made in the rates to Bethlehem and Allentown. The rates remained at sixty cents per ton (with the exception just noted of the fifty-cent local rate to Bethlehem via the Lehigh and New England Railroad) from Nazareth to all three destinations until October 16, 1911, when the rates to Easton and Bethlehem were reduced to fifty cents per ton, the rate to Allentown being left at sixty cents. January 15, 1913, the sixty-cent joint rates from Nazareth to Easton and Bethlehem were restored and the joint rate to Allentown was raised to seventy cents per ton,—no change, however, being made in the fifty-cent local rate via the Lehigh and New England Railroad from Nazareth to Bethlehem.

Nazareth is centrally located in a cement-producing region, which is roughly divisible into three districts: the New Jersey district, in which are located Alpha, Vulcanite and New Village; the Nazareth district, extending from Martin's Creek, on the Delaware River westward to Bath, Northampton County; and the Lehigh district, along the Lehigh River, partly in Northampton County, but mainly in Lehigh County in the vicinity of Coplay. Easton is nearest to the New Jersey district. Allentown is

nearest to the Lehigh district, while Bethlehem is about equally distant from the Nazareth and Lehigh districts.

Each of the three markets is served from all three districts, there being two or more railroads out of each district. The Lehigh Valley Railroad and the Central Railroad of New Jersey pass through the Lehigh district and through Allentown, Bethlehem (the Lehigh Valley through South Bethlehem) and Easton. By these two railroads, also, Alpha and Vulcanite, in the New Jersey district, are connected with the three cities. The railroads that serve the plants of the complainants in the Nazareth district are the Lehigh and New England and the Delaware, Lackawanna and Western. The tracks of the Lehigh and New England Railroad reach Bethlehem, but not Easton and Allentown. The most direct routes to Easton from the complainants' factories near Nazareth are by the Lehigh and New England Railroad to Stockertown and thence via the Lehigh Valley, or by the Delaware, Lackawanna and Western Railroad to Belfast Junction, and on via the Lehigh Valley. Other less direct lines via various connections are possible, and cement from the Nazareth district can and does reach not only Easton but Bethlehem and Allentown by numerous routes. The adjustment of cement rates from the several districts to the three markets in question is complicated by competition both among producers and among carriers.

The general or standard cement rates to Easton, Bethlehem, and Allentown have been fifty cents per ton when the shipment was local to one line, and sixty cents per ton when the freight moved over two lines. Upon the 23d of February, 1915, in connection with the general increase of five per cent. in freight rates, these standard fifty cent and sixty cent rates were raised to fifty-three and sixty-three cents. Some exceptions to these general rates have been made, mainly because the sixth-class local rate for the short distances from Vulcanite and Alpha to Easton, and from Coplay to Allentown has been two cents per hundred pounds or forty cents per ton (since February 23, 1915, two and one-tenth cents per hundred and forty-two cents per ton). The local, or one-line rate from Alpha and Vulcanite to Easton being forty cents, the joint, or two-line, charge from those two points

and from New Village was fifty cents per ton. The one-line local rate from Coplay to Allentown was forty cents per ton, and the rate to Allentown from points on the Ironton Railroad, a short terminal or industrial road in the Lehigh cement district, was made forty cents to correspond with the sixth-class local rate from Coplay. Upon the 23d of February, the forty cent rate was changed to forty-two cents and the fifty cent rate to fifty-three cents.

The adjustment of rates at the time the complaint was filed required the complainants having plants near Nazareth to pay a freight rate of sixty cents per ton on cement shipped to Easton; while their competitors, having plants in the New Jersey and Lehigh districts, were charged forty or fifty cents a ton. The rate from the Nazareth district (Martin's Creek to Bath, inclusive) to Easton is for a joint or two-line haul and is ten cents higher than the one-line, or local rate to Easton from the Lehigh district. The two-line rate to Easton from the Nazareth district is also ten cents above the fifty-cent joint rate from the New Jersey district, which joint rate is ten cents above the forty-cent local sixth-class rate from Alpha and Vulcanite to Easton. An increase of two cents in the forty-cent rates and of three cents in the fifty-cent rates became effective February 23, 1915. It is our opinion that the present adjustment of rates on cement to Easton from the three cement-producing districts is not unreasonable. A charge of ten cents more for a joint service than for a local or one-line haul seems justified. The reasonableness of the one-line rate not having been questioned, a joint rate of ten cents a ton above the local rate can not be held to be unjust.

The joint interstate rate of fifty cents (or fifty-three cents) from the New Jersey district to Easton—ten cents less than the joint rate from the Nazareth district to Easton—does not, in our opinion, establish the unreasonableness of the sixty-cent (or sixty-three-cent) joint rate from the Nazareth district. The controlling factor in the cement rates from the New Jersey district to Easton is the forty-cent (or forty-two-cent) local sixth class rate from Alpha and Vulcanite, which places are within five miles of Easton. A joint rate of fifty (or fifty-three) cents per ton from Alpha, Vulcanite and New Village to Easton would

seem reasonably related both to the forty-cent (or forty-two-cent) local rate from Alpha and Vulcanite to Easton and to a sixty-cent (or sixty-three-cent) joint rate applying from the entire Nazareth district to Easton.

The rates on cement from the three producing districts to Bethlehem are held to be equitably adjusted; but it is our opinion that the joint rate of seventy cents (since February 23, 1915, of seventy-four cents) per ton on cement from the Nazareth district to Allentown is unreasonably high as compared with the one-line rates from the Lehigh and New Jersey districts. The local rate to Allentown from Coplay and points on the Ironton Railroad in the Lehigh district was forty cents per ton and since February 23, 1915, has been forty-two cents. The one-line or local rate from Vulcanite and Alpha, New Jersey, to Allentown, was fifty (since February 23, 1915, fifty-three) cents per ton. It is held that the joint rate from the Nazareth district to Allentown should be reduced ten cents per ton and should not exceed sixty-three cents per ton of 2,000 pounds.

An order will issue requiring the carriers participating in the transportation of cement to Allentown from the Nazareth district, to wit: from plants located in or near Bath, Penn Allen, Nazareth, Stockertown, Sandt's Eddy, and Martin's Creek, in Northampton County, Pennsylvania, to establish a joint rate of not more than sixty-three cents per ton of 2,000 pounds.

#### ORDER.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof.

*Now, to wit, March 4, 1915, It is ordered,* that the Lehigh Valley Railroad Company, the Central Railroad Company of New Jersey, the Delaware, Lackawanna and Western Railroad Company, the Ironton Railroad Company, the Lehigh and New England Railroad Company, and the Bangor and Portland Railroad

Company establish, according to law, joint rates of not more than sixty-three cents per ton of 2,000 pounds for the transportation of cement to Allentown from the Nazareth district, to wit, from plants located in or near Bath, Penn Allen, Nazareth, Stockertown, Sandt's Eddy and Martin's Creek, the said rates to become effective on or before April 10, 1915, upon five days' notice to the public and this Commission.

By the Commission.

SAMUEL W. PENNYPACKER, *Chairman.*

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CHARLES S. KEEFER v. THE PENNSYLVANIA RAILROAD COMPANY.

*Station facilities.*

COMPLAINT DOCKET NO. 316.

Submitted Nov. 29, 1914.

Decided Feb. 17, 1915.

Report and Order.

This matter being before the Commission upon complaint and answer on file, and a hearing having been held, and it appearing to the Commission that the Pennsylvania Railroad Company maintains a station at Woodside which is not heated and at which there is no signal device by which a train can be stopped, and that the accommodation and convenience of the patrons require such facilities:

Now, to-wit, February 17, 1915, it is ordered, That the Pennsylvania Railroad Company install a stove in the waiting-room of its station at Woodside and a signal device on the platform of said station for the use of the patrons of the company who desire to have trains stop at said station.

By the Commission,

SAMUEL W. PENNYPACKER, *Chairman.*



**T. M. HURST, ET AL. v. ERIE RAILROAD COMPANY.***Train service—Time schedules.*

Complainants alleged that since the respondent had discontinued the operation of two trains between Blossburg and Arnot the service between those points was inadequate. It appeared upon hearing that no readjustment of the time schedules had been made after the discontinuance of the said trains and that passengers from Arnot were greatly inconvenienced by lack of proper connections for through transportation at Blossburg.

*Held:* The respondent should improve its service either (1) by restoring the said trains, or (2) by revising its time schedules so as to provide proper connections.

**COMPLAINT DOCKET No. 289.**

Submitted October 13, 1914.

Decided February 17, 1915.

**Report and Order of Commission.****COMMISSIONER GAITHER:**

The above complainants ask that the respondent company be compelled to restore certain passenger service between Arnot and Blossburg, Tioga County. Arnot has a population of between 2,500 and 3,000, and is about four miles west of Blossburg, the latter place being on a direct line to Elmira, New York.

Prior to September 18, 1914, the service between the two points named was apparently satisfactory, but on this date two trains were discontinued; namely, No. 257, leaving Elmira at 9:15 a. m., passing through Blossburg and arriving at Arnot at 11:47 a. m., and No. 258, leaving Arnot at 12:56 p. m., passing through Blossburg and arriving at Elmira at 3:50 p. m. The elimination of these trains greatly inconvenience the people of Arnot, because of the fact that they have no connection with Elmira, except with considerable delay at Blossburg going in either direction.

Under existing conditions passengers departing from Elmira at 9:15 a. m. do not reach Arnot until 2:15 p. m., and those leaving the first named city at 4:45 p. m. do not arrive in Arnot until 6:30 a. m. the next day. Passengers leaving Arnot at 9:30 a. m. do not get to Elmira until 3:50 p. m., and those departing at 2:30 p. m. must remain all night in Blossburg, arriv-

ing at Elmira at 9:40 a. m. The railroad schedule shows the distance between Elmira and Arnot to be 50 miles.

Considerable testimony was offered by the complainants to substantiate their claims, including estimates on freight and coal tonnage out of Arnot. The railroad company also furnished statistics as to this point, and contended that the earnings of the passenger service did not warrant a continuance of the two trains referred to. It was also claimed by the company that it operated these trains at a loss of between \$2.63 and \$3.06 each trip between Arnot and Blossburg, and that it was not a matter of discrimination, but a strictly business proposition. Another basis of defense was that a newly organized bus line operating between Arnot and Blossburg thereby injured the passenger business of the company between these points.

While there cannot be any criticism of the respondent company for its efforts towards retrenchment, yet such a movement should not have been inaugurated to the detriment of the people of Arnot, and had the respondent company so modified its whole schedule as to give the residents of that village proper service, it is doubtful whether this action would have been brought. Instead the company simply discontinued the two passenger trains without regard to proper connections at Blossburg, and made it compulsory on the part of the people of Arnot to utilize so called mixed trains with inconvenient connections.

While the complainant also raised the point that the service of the "funeral trains" between Arnot, Blossburg and Morris Run was inadequate, this has to do with the regular schedule and was taken into consideration by the Commission as part of the claim as to the discontinuance of the trains named therein.

An order will be drawn directing the respondent to establish additional passenger service between Blossburg and Arnot, either by restoring the service of trains Nos. 257 and 258 between said points, or by so arranging its schedules that train No. 105 shall leave Blossburg as soon as possible after its arrival there and proceed to Arnot, returning from Arnot to reach Blossburg before the departure of train No. 258.

## ORDER.

This case being at issue on complaint and answer on file and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

Now, to-wit, February 17, 1915, it is ordered, That the respondent establish additional passenger service between Blossburg and Arnot, either by restoring the service to and from Arnot of train No. 257, leaving Elmira at 9:15 a. m., and arriving at Blossburg at 11:28 a. m., and train No. 258, leaving Blossburg at 1:41 p. m. and arriving at Elmira at 3:50 p. m., or by so arranging its schedules that train No. 105 shall proceed to Arnot and returning reach Blossburg in time to connect with train No. 258, leaving at 1:41 p. m.

By the Commission,

SAMUEL W. PENNYPACKER, *Chairman.*

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FRANK D. GEER *v.* CAMBRIA INCLINED PLANE COMPANY.

*Inclined plane companies—Classification of traffic—Rates.*

The complainant alleged that certain rates charged by the respondent were unjust and discriminatory, and that the facilities were insufficient and inadequate.

*Held:* 1. In the operation of an inclined plane the service performed for a customer with a vehicle is of more value, and the expense to the company in rendering the service is greater, for an "up" than for a "down" trip, and the practice of the respondent in charging a higher rate for an "up" than for a "down" trip is reasonable and lawful.

2. A classification of vehicles carried which is based upon the number of seats, or the number of horses attached, subdivided as between pleasure vehicles or otherwise, is reasonable and lawful. A classification based upon the weight of, or the space occupied by, the vehicle, would interfere with the efficiency of the service and would delay traffic.

The Commission ordered certain improvements and changes in the facilities and schedules and in the regulations of the respondent, as set forth in the report.

## COMPLAINT DOCKET No. 242, 1914.

Submitted June 26, 1914.

Decided February 4, 1915.

## Report and Order of the Commission.

*B. P. Weimer*, for complainant.*H. S. Endsley*, for respondent.

## COMMISSIONER TONE :

The complaint of Frank D. Geer against the Cambria Inclined Plane Company alleges that a new schedule of rates for vehicles was published January 1, 1914, which rates are unjust for the reasons that the respondent under a schedule of rates less than those now in force, earned in 1911 twenty-two per cent. dividends upon its capital invested; that the annual cost for tolls to patrons has been greatly increased by the discontinuance of sale of the former 750-trip *annual* limited vehicle tickets and selling instead thereof 100-trip *quarterly* limited vehicle tickets; that a greater charge is made for a vehicle on an "up" trip than a "down" trip; that the relative charges for single and double trips up, similar trips down and similar round trips are inconsistent; that the rates are exorbitant for automobiles as compared to other vehicles, and are also discriminatory due to a classification based solely on the number of seats; that the passenger accommodations are unsanitary and the facilities inadequate.

From the evidence submitted at the hearing the facts found are that the respondent owns and has operated since 1891, from a point in the City of Johnstown up to a point in the Borough of Westmont, an inclined plane consisting of an approach to and a steel truss bridge over the Stoney Creek River to the foot of the incline and thence a double track inclined plane up the hillside for a distance of about 880 feet, on which are operated two inclined plane cars, each having a platform twenty-six feet long by twelve feet wide, with covered roof and two sides enclosed, and underneath a cabin for passengers about seven and one-half feet by six and two-thirds feet, reached by stairways from the main landing floors at the foot and top of the plane respectively; that the incline was constructed for the purpose of furnishing transporta-

tion facilities between the city of Johnstown and a desirable locality for home sites at a considerable elevation above and to the west of the city and where at the time there was practically no population; the borough at Westmont is entirely a residential community, with a rapidly increasing number of inhabitants and is dependent almost entirely upon the inclined plane of the respondent for facilities in reaching Johnstown; that the respondent has a capital stock of \$50,000.00; that the original cost of installation of the plane was about \$133,000.00; that the net earnings since the commencement of operations aggregate about \$96,000.00; that the gross annual income at present is about \$33,000.00 to \$35,000.00; that the net earnings for 1913 were less than five per cent. on \$133,000.00; that fifteen to twenty-one trips are made per hour during rush hours, and two hundred ten to two hundred thirty trips are made per day, there being no schedule time for trips at non-rush hours, the cars being then run according to the judgment of the operators depending on the accumulation of traffic that on January 1, 1914, a new schedule of rates was placed in effect which made some increases in certain of the rates formerly charged for vehicles, the principal change being the withdrawal from sale of 750-trip *annual* limited passenger vehicle tickets, for one-horse carriage or one-seated automobile for \$30.00, and for two-horse carriage or two-seated automobile for \$37.50, and substituting therefor the sale of 100-trip *quarterly* limited passenger vehicle tickets, for one-horse carriage or one-seated automobile for \$7.50 and for two-horse carriage or two-seated automobile for \$12.50; that vehicular traffic is divided for rate purposes—first, as to whether it is single, i. e., a one-horse carriage or wagon or one-seated automobile, or double, i. e., a two-horse carriage or wagon or two-seated automobile; and second, each of said above classes are then sub-divided as to passenger vehicles and those not passenger vehicles; that the rates charged vehicles for “up” trips are greater than for “down” trips; that the inconsistency complained of in rates charged single and double vehicles “up,” “down,” and for a “round-trip” is based upon those in the following tabulation:

1. Single vehicle—“up” 25c., “down” 10c., “round-trip” 30c.
2. Double vehicle—“up” 35c., “down” 20c., “round-trip” 45c.;

that at times the facilities are not sufficient to immediately accommodate all the traffic offered; that the passenger accommodations have at times in the past been unsanitary and at present the respondent is making systematic efforts to maintain sanitary conditions; that the respondent, though providing below the floor of its inclined cars a cabin for passengers, reached by stairs from the main floor levels, has posted along said stairways signs marked "Danger" without explanation thereof, and though the cabin is closed after 8:00 p. m., and when open is not of sufficient capacity to accommodate the passenger travel which is accepted by the respondent and largely carried on the main platform floors of the inclined cars, another sign is there posted to the effect that "This platform is for vehicle traffic only." "Passengers ride here at their own risk"; that owing to the limited size of the platforms, vehicles are sometimes placed thereon to the inconvenience and annoyance of passengers, and at times to the extent of causing danger or injury to other vehicles; that vehicles while on the incline are not securely blocked to prevent movement during passage; that garbage wagons are carried to the annoyance of passengers.

The original cost of the incline and its maintenance have been materially increased by the construction of the steel bridge over Stoney Creek River and the approaches thereto. The net earnings of the company since commencement of operations show a small return upon its investment of \$133,000.00, but this is probably due to the limited traffic available during the early years of the development of Westmont and of itself would not indicate that the rates charged had been too low. The principal increase in tolls on January 1, 1914, resulted from the withdrawal of the 750-trip *annual* limited passenger vehicle tickets at \$30.00 and \$37.50 for single and double vehicles respectively, and the substituting therefor of the 100-trip tickets limited to three months at \$7.50 and \$12.50 respectively, thereby increasing the charges to those purchasing and using all of such tickets by one hundred eighty-five to two hundred fifty per cent. The respondent presented no evidence justifying an increase in said rates to that extent and is directed to furnish the Commission with a detailed statement of its gross earnings operating expenses and net earn-

ings for each of the past ten years, and showing for the first nine months of 1913 and 1914 respectively the receipts from each class of tickets or cash fares sold or collected by it.

There is some merit in the complaint as to the consistency in the rate charged, when compared, single and double vehicles, for "up," "down" and "round-trips," and while it is impossible from the evidence submitted to single out an individual rate for modification, it is suggested that the respondent so revise certain of such rates as to have more direct relations to each other.

In the operation of an inclined plane as the service performed for a customer with his vehicle is of more value to the customer for an "up" than for a "down" trip, and the expense to the company in rendering such service is greater for the "up" than for the "down" trip, it is believed that the practice of the respondent in charging a higher rate for an "up" than a "down" trip is reasonable and lawful.

The classification of vehicles is alleged to be discriminatory and improper because based solely upon the number of seats in a vehicle or the number of horses attached, sub-divided as between pleasure vehicles or otherwise; and it is contended that the classification should be based upon weight and also on space occupied, which would require a considerable tabulation of tariffs, of a complicated character and not always uniform in application as the number of seats of different vehicles has no numerical relation to the weights of vehicles, nor has either the number of seats or weights of vehicles any relation to the spaces occupied by the same. One of the principal functions of an inclined plane is the forming of a connecting link in a highway, and the system of rates and tolls must be such as to be readily and promptly applied by the conductors in order to expedite and not delay traffic. As shown by the evidence the present classification of the respondent follows generally that of other inclined planes and being such as to facilitate the movement of traffic, it is considered to be proper, reasonable and not discriminatory.

The incline appears to be carefully operated, regularly inspected and efficiently managed.

The evidence submitted does not sustain the complaint as to the unsanitary condition of the incline cars at the present time

and the methods of the respondent in cleansing the platforms and cars is deemed proper and sufficient. There appear to be toilet facilities at the foot of the incline and if lights be provided, the respondent's duty relative thereto would seem to be performed.

The practice of the respondent in placing "danger" signs in the stairway to the passenger cabins and warning signs on the car platforms, as testified to, without further explanation thereof, is unreasonable, as the duty of the respondent is to provide a safe passageway to its cabins, and if it be necessary for passengers to find accommodations on the car platforms and the respondent generally there receives and transports them, it is unreasonable to notify such patrons that they are there at their own risk.

Exhibit No. 2 of the respondent, filed to furnish data concerning other inclines as well as that of respondent, has several incorrect statements. If correct as to the "size of cars," it indicates that the platform of the respondent is the smallest of those shown for vehicular traffic and that it should be ultimately enlarged. The population of Westmont and the traffic on the inclined plane are both increasing and access to the borough is largely dependent on the incline of the respondent. The respondent offers no plans for increasing its facilities though its duty is to provide for the increase in traffic due to the growth of the borough. From a consideration of the reports of the traffic submitted by the respondent, it is not believed that an order should be issued at this time directing the respondent to increase its facilities, but that in the making of renewals or extended repairs from time to time respondent should perform the same in such manner as to facilitate an enlargement of its inclined cars at as early a date as practicable and whenever the traffic necessitates the same.

The Commission is of the opinion that the respondent should change its signs of "danger," etc., in the stairways to the cabins and on the incline car platforms; provide and put in place on each trip heavy wheel blocks or chains fastened to the floors of cars for holding vehicles firmly in one position during transit; post notices of its general schedule of or principles followed in determining the *times* of trips—of maximum time between trips,—of precedence during rush hours of foot passengers over ve-



hicles—of precedence of vehicles in case driver of one vehicle declines to occupy incline car when another vehicle will be thereon,—of specific hours that garbage wagons are allowed the use of the plane; revise its schedule of rates for limited vehicle tickets; furnish the Commission with the financial reports called for on page 4; correct Exhibit No. 2.

ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

Now, to-wit, February 4, 1915, it is ordered, That the Cambria Inclined Plane Company, the respondent, make the improvement in its service set out in the report of the Commission above referred to, by the adoption of the devices and practices therein mentioned, and that it report to the Commission within thirty days from the date of this order the steps which have been taken by it to carry out the aforesaid improvements.

By the Commission,

SAMUEL W. PENNYPACKER, *Chairman.*

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GOMER JONES, ET AL. v. THE DELAWARE, LACKAWANNA AND  
WESTERN RAILROAD COMPANY.

*Rates—Suburban service.*

Complainants alleged that the increase in the passenger rate from Taylor to Scranton from five to ten cents was unreasonable. The distance between said points is three and one-half miles and the traffic is of a suburban character. The respondent averred that the traffic required the carrying of additional coaches on certain trains stopping at Taylor, that the revenue derived did not cover the additional expense and that the increase in fare had been made in order to divert traffic from this line. The evidence showed that on many occasions additional coaches were required in order to accommodate passengers to and from points beyond Taylor, and that the whole of the expense of the additional coaches could not reasonably be charged to the Taylor traffic.

*Held:* The increase in fare was unreasonable.

## COMPLAINT DOCKET No. 247.

Submitted July 1, 1914.

Decided February 4, 1915.

## Report and Order of the Commission.

*J. E. Watkins*, for complainants.*J. H. Oliver, Frederick W. Fleitz, and Ralph J. Baker*, for respondent.

## COMMISSIONER JOHNSON :

The Borough of Taylor, Lackawanna County, Pa., is located approximately three and one-half miles by railroad from the center of the City of Scranton. The borough has a population of 9,000, and is connected with Scranton not only by the Bloomsburg Division of the Delaware, Lackawanna and Western Railroad (one of the respondent company's lines), but also by the Central Railroad of New Jersey, and by an electric line of the street railway system of Scranton. The Delaware and Hudson Railroad with a station at Minooka close to Taylor, also has a line to Scranton.

The train service between Taylor and Scranton includes one train each way on the Central Railroad of New Jersey, ten trains in each direction on the Delaware and Hudson Railroad, while the service of the Delaware, Lackawanna and Western consists of five trains from Taylor to Scranton, and four daily from Scranton to Taylor. In addition to these services, the electric line of the Scranton Railway Company operates cars at frequent intervals between Scranton and Taylor. The respondent company runs four trains each way daily on the Bloomsburg Division between Scranton and Northumberland, and with stops at Taylor; and, in addition to these trains, there is a train operated between New York and Kingston. This train leaves Kingston at 7:10 a. m., stopping at Taylor at 7:45, and arriving at Scranton at 7:55. On the return trip from New York, this train departs from Scranton at 9:20 p. m., but does not make a stop at Taylor on the run to Kingston.

For a number of years prior to October 8, 1913, the fare charged by the respondent company between Taylor and Scranton was five cents, which fare is still charged by the other steam

roads connecting Taylor and Minooka with Scranton. On the date just mentioned, the respondent company advanced the fare to ten cents. When the fare was five cents, a large number of persons (50 or more, according to the record) travelled on the respondent's morning train from Taylor to Scranton. When the fare was advanced to ten cents, the number of passengers from Taylor on this train is said to have been reduced to an average of eight to ten.

In order to accommodate the relatively large number of passengers that travelled from Taylor to Scranton on the morning train when the fare was five cents, the respondent company was obliged to include in the train from Kingston to Scranton a smoker and two day coaches in addition to the two Pullmans which this train regularly carries between Kingston and New York. Except when the travel was unusually large from Scranton east, one of the day coaches from Kingston was taken out of the train at Scranton, this coach being ordinarily taken back to Kingston by a train leaving Scranton at 6:40 p. m. The respondent's acknowledged purpose in increasing the fare from five to ten cents was so to reduce the travel from Taylor to Scranton on this morning train as to enable the company to run one day coach instead of two day coaches in addition to the smoking car and the Pullmans. The company sought to make the rate high enough to divert to other carriers most of the passengers that had travelled from Taylor to Scranton by the respondent's morning train from Kingston to New York.

Two questions are raised by the case at issue; (a) the reasonableness of the respondent's increase in the fare between Taylor and Scranton from five to ten cents; (b) the reasonableness of the action of the company in increasing fares for the purpose of withdrawing facilities which the public had enjoyed and made large use of prior to the increase in the fares.

While a fare of five cents for a distance of three and one-half miles may be regarded as a low charge per se, there are several considerations tending to establish the relative reasonableness, under present conditions, of a five-cent fare by the respondent company between Taylor and Scranton. The borough of Taylor with a population of at least 9,000 is a suburb of the important

city of Scranton, with a probable population of 140,000. As correctly stated by counsel for the respondent: "Taylor is a suburb and a great many people work in Scranton. That is not so in Old Forge, and it is not so in Moosic and the other towns around there. Taylor is an exceptional town in that respect. . . . Now this train just suits their convenience in the morning and they will keep on using it if they can at a five-cent rate."

A fare of five cents each way between Taylor and Scranton for a service which is suburban in character is not out of line with the charge of 35 cents one way for the 17.4 miles between Scranton and Kingston, nor with the charge of 35 cents made by three rail lines for the 19 miles between Scranton and Wilkes-Barre. Moreover, the fare now charged by the Central Railroad of New Jersey from Taylor to Scranton, and by the Delaware and Hudson Railroad from Minooka to Scranton is five cents each way. This has been the fare for many years and was the charge of the respondent company for a considerable period prior to October 8, 1913.

It happens that the fare by the electric railway from Taylor to Scranton is ten cents. This fact, however, does not necessarily justify a ten-cent fare between Taylor and the passenger station of the respondent in the City of Scranton. The street railway company charges five cents for a trip within the municipal area of Scranton, and has a five-cent fare zone outside of the city. Taylor is a comparatively short distance outside of the city limits of Scranton. Persons riding by trolley from Taylor to Scranton may reach any part of the city for ten cents; those travelling from Taylor to Scranton by steam railroad are required, in many cases, to pay a five-cent street railway fare from the railroad station to their destination within the city.

In support of the increase that was made in fares between Taylor and Scranton for the purpose of enabling the respondent company to haul one less day coach ordinarily from Kingston to Scranton in the morning and from Scranton to Kingston on an evening train, it was testified by the superintendent of the Scranton Division of the respondent company's railroad, that the daily cost of maintaining a passenger coach and hauling it over the round-trip run between Kingston and Scranton was \$6.65, and

that, inasmuch as the fares received by the company at five cents per passenger from those travelling by the morning train from Taylor to Scranton was less than \$6.65, the respondent was justified in raising the fares from five to ten cents between Taylor and Scranton.

The increase in fare, it should be noted, applies not only to the passengers taking the morning train from which the respondent desired to withdraw one passenger coach, but to all passengers travelling by any of the respondent company's trains between Scranton and Taylor. The cost figures presented by the witness for the respondent have not been verified; but, assuming that they are correct, it is not clear that the traffic between Taylor and Scranton should bear the entire cost of operating a day coach on the round trip between Kingston and Scranton. Witnesses for the complainant testified that the day coach, which prior to October 8, 1913, was run from Kingston to Scranton in the morning mainly for the accommodation of passengers from Taylor to Scranton, was also used to some extent by passengers to Scranton from points between Kingston and Taylor. The record also shows that two day coaches in addition to the smoking car are not infrequently required for the accommodation of the traffic to Scranton on the respondent's New York morning train. A record of the number of passengers and of the train "consist" for the week Saturday, November 7, 1914, to Friday, November 13, 1914, inclusive, was reported to the Commission by the company; and the report shows that, even with the present ten-cent fare, the company was obliged to run two day coaches, besides the smoker on Monday, November 9, there being, on that date, 174 passengers in the smoker and day coaches upon the arrival of the train at Scranton. On the other days of the week covered by the report, there was one day coach beside the smoker, and the average number of passengers in the two cars upon the arrival of the train in Scranton was 135, which would indicate that the coaches were used practically to their entire capacity. From the facts of record it would appear that the respondent company ought regularly to include in the train leaving Kingston at 7:10 in the morning for Scranton and New York, two day coaches in addition to the smoking car. If this is done, there will be no difficulty

in affording reasonable accommodations for all passengers that may desire to travel by this train from Taylor to Scranton for a fare of five cents.

An order will issue requiring the respondent company to establish a passenger fare of five cents each way between Taylor and Scranton, and to provide adequate facilities for the accommodation of passengers desiring to travel from Taylor to Scranton.

#### ORDER.

This case being at issue, upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

Now, to-wit, February 4, 1915, it is ordered, That the Delaware, Lackawanna and Western Railroad Company establish, according to law, a passenger fare of five cents each way between Taylor and Scranton, and provide adequate facilities for the accommodation of passengers desiring to travel from Taylor to Scranton.

By the Commission:

SAMUEL W. PENNYPACKER, *Chairman.*

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#### NORWICH TELEPHONE COMPANY v. BELL TELEPHONE CO. OF PENNA.

#### COMPLAINT DOCKET No. 283.

#### *Rate for joint exchange and toll service.*

The Norwich Telephone Company alleged that the terms of the contract for joint exchange and toll services, rates, and charges, between that company and the Bell Telephone Company, were unreasonable and discriminatory.

*Held:* The charges of the Bell Company contained in the said contract are reasonable.

Filed September 8, 1914.

Decided February 4, 1915.

## Report and Order of the Commission.

*F. D. Gallup*, for complainant.*Frankland Briggs*, for respondent.

## COMMISSIONER TONE:

The complaint of the Norwich Telephone Company against The Bell Telephone Company of Pennsylvania alleges that The Bell Company has compelled the complainant to enter into a new contract for joint exchange and toll services, rates and charges, under terms differing materially from those of a former contract between the parties which was terminated September 1, 1914; and that The Bell Company grants to other telephone companies exchange services similar to that furnished the complainant at more favorable rates and terms to such other companies than to the complainant.

The answer of the respondent states that the new contract with the complainant provides for the same rates and charges for exchange and toll services for the complainant as are set forth in the published tariffs of the respondent; and the same as are in effect with all other telephone companies for like service, except that, the respondent has in existence several contracts, each for a specified number of years, the terms of which do not conform to its published tariffs, and that each such contract, as it expires, is being superseded by a new contract under terms and conditions conforming to the published tariffs of the respondent.

The Norwich Telephone Company furnishes telephone service to forty-nine subscribers located in Norwich and throughout several miles of territory surrounding said town, which is twelve miles from Smethport, McKean County. Its subscribers are connected directly to the telephone exchange of The Bell Company at Smethport and are given free service to the three hundred subscribers of the latter company in Smethport. The Norwich Telephone Company has no telephone exchange. All central station service is performed for it at Smethport by the Bell Company.

The Norwich Telephone Company charges its party line subscribers fourteen dollars per year and its one individual line sub-

scriber eighteen dollars per year, out of which amounts payment is made by the Norwich Company of five dollars per year per subscriber to the Bell Company for its central station services, for free service to the latter company's Smethport subscribers, for telephone directories, and for connections for toll services when desired. The Norwich Company guarantees, collects and pays monthly to the Bell Company all toll charges for messages originating on the lines of the Norwich Company.

Under the former contract the Bell Company furnished the said central station or exchange service, etc., to the Norwich Company for three dollars per year per subscriber; and, to cover the cost of collection, allowed the Norwich Company fifteen per cent. of all charges collected by it for toll messages originating on the lines of the Norwich Company. By the terms of the new contract, the Norwich Company pays to the Bell Company five dollars per year per subscriber and does not receive any allowance for its services in guaranteeing and collecting the toll charges.

The Bell Company has at present two contracts, one with the Grange Telephone Company and one with the Marvin Creek Telephone Company, each connected to its Smethport Exchange, having the same terms and conditions as the original contract of the Norwich Telephone Company. The evidence was that these two contracts expire during the year 1915, and that upon termination they are to be superseded by contracts similar in terms and conditions to the new contract with the Norwich Company.

At the hearing, the representatives of the Norwich Company admitted that the charge of five dollars per year per subscriber was reasonable, if it be allowed fifteen per cent. for collecting toll charges; and submitted evidence showing that there was a large amount of toll business originating on the complainant's lines from the use of its phones by many non-subscribers, as well as subscribers, that the complainant was under a considerable expense in collecting for such toll messages, that said expense amounted to about fifteen per cent. of the amounts collected for the tolls; and the complainant maintains that it is unreasonable and unfair to require it to collect all toll charges without compensation therefor, in view of the fact that, there being no other telephone service in the district, a large proportion of the toll business originates



from non-subscribers who with the Bell Company receive all the advantages and benefits of such service over the complainant's lines, and that such non-subscriber toll service is of no benefit to the complainant nor its subscribers, being instead a disadvantage to the extent that such business occupies or loads its subscribers' lines and interferes with the subscribers use of its lines. The complainant presented evidence showing that it was under considerable expense after receipt from the Bell Company of the monthly memoranda of toll charges, in classifying and dividing said charges among and rendering statements to its subscribers.

The respondent was "inclined to admit the collecting is worth fifteen per cent.," but maintained that it could not render toll service at its published rates less fifteen per cent. for collection, and that such an allowance could not properly be made to the complainant without a violation of its published tariffs and without producing a discrimination against many other connecting telephone companies with which it has existing contracts in accord with its tariffs, and from which companies no complaints have ever been received.

If, as the complainant maintains, much of the toll business results from the use of its phones by non-subscribers, the cost to it of collecting such tolls can be provided for, by its publishing proper and reasonable tariffs for furnishing such service to non-subscribers.

The Commission is of the opinion that the evidence submitted does not warrant granting to the complainant a rate for subscribers exchange service, etc., and an allowance for the collection of toll charges, different from the published tariffs of the respondent; but, directs that in order to lessen the expense and time of the agent or representative of the complainant company in the collection of the toll charges, the respondent furnish to each subscriber of the complainant, monthly statements showing the amounts due from such subscriber for toll messages, with information as to the number of toll messages from said subscriber, and from non-subscribers with their names, station called, date, etc., and furnish to the agent or representative of the complainant a duplicate copy of each of such statements with a sheet having a detailed summary thereof.

**ORDER.**

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties and full investigation of the matters and things involved having been had, and the Commission having on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

Now, to-wit, February 4, 1915, it is ordered, That The Bell Telephone Company of Pennsylvania furnish to each subscriber of the Norwich Telephone Company monthly statements showing the amounts due from such subscriber for toll messages, with information as to the number of toll messages from said subscriber, and from non-subscribers with their names, station called, date, etc., and furnish to the agent or representative of the Norwich Telephone Company a duplicate copy of each of such statements, together with a statement giving a detailed summary thereof, and that the complaint in this case be, and the same is, hereby dismissed.

By the Commission:

SAMUEL W. PENNYPACKER, *Chairman.*

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**APPLICATION OF THE WILKES-BARRE CONNECTING RAILROAD CO.  
FOR CERTIFICATES OF PUBLIC CONVENIENCE.**

*Grade Crossings—Elimination of—Apportionment of Cost of Viaduct.*

The Wilkes-Barre Connecting Railroad Company filed with The Public Service Commission a petition praying for Certificates of Public Convenience evidencing the approval by the Commission of the construction by the said Railroad Company of crossings on its proposed line in Luzerne County. At the hearings held on said petition it was brought to the attention of the Commission that certain of the crossings were at grade, and the Commission decided that the safety and convenience of the public demanded the elimination of two of the proposed crossings, and the substitution therefor of a viaduct over the tracks of the said Railroad Company and the tracks of the Central Railroad Company of New Jersey.

Plans for the construction of said viaduct were approved after hearings, and the Commission made an order directing the construction in accord-

ance with the plans and specifications, apportioning the cost of the improvement among the parties interested, and awarding damages to the owners of adjacent property, taken, injured or destroyed.

**APPLICATION DOCKET No. 94, 1914.**

**Finding, Determination and Order of the Commission.**

**Filed May 4, 1914.**

**Decided January 22, 1915.**

*F. W. Fleitz, Ralph J. Baker, and Welles & Torrey, for applicant.*

*B. R. Jones, for Wilkes-Barre Railway Co.*

*Richard B. Sheridan, Solicitor for Miners Mills Borough.*

*C. E. Miller and William A. Barkelow, for C. R. R. of N. J.*

*A. P. Conniff, for Plains Township.*

*J. C. Kosek, R. P. Esbey, Fred B. Davis, Harry H. Weintraub, Charles D. Coughlin, William D. McLean, Jr., for property owners.*

**BY THE COMMISSION :**

The Wilkes-Barre Connecting Railroad Company, by a petition dated May 4th, 1914, applied to the Public Service Commission for the issuance of Certificates of Public Convenience approving the proposed construction of a number of crossings by said railroad company over the facilities of other public service companies and over certain highways in various municipalities in Luzerne County. The crossings mentioned in the petition presented to the Commission covered the entire line of the Wilkes-Barre Connecting Railroad, which is being constructed primarily for the purpose of eliminating the necessity of exchange of traffic between the Delaware and Hudson Company and The Pennsylvania Railroad Company in the heart of the City of Wilkes-Barre. Objection was made to the approval of the construction of certain of the crossings mentioned in the petition, and the Commission, in due course, held hearings to determine the necessity or propriety of approving the construction of the crossings in accordance with the plans and specifications filed with the petition.

At the hearings it developed that among the crossings the approval of which was asked for, there was a grade crossing by said Railroad Company over the tracks and facilities of the Wilkes-Barre Railway Company at a point in the Borough of Miners Mills, and a grade crossing over Mill Street in the said Borough, these two crossings being approximately 200 feet apart and being marked in the petition and plan filed respectively as Crossings "B" and "C." The testimony showed that at the present time the facilities of the Wilkes-Barre Railway Company and Mill street were both crossed at grade by the single track of a branch of the Central Railroad Company of New Jersey, which has been operated in this locality for a great many years.

After taking a great deal of testimony and making a thorough investigation of the conditions, the Commission was of the opinion that it was necessary and proper for the service, accommodation and convenience of the public to abolish the existing grade crossings of both the tracks of the Wilkes-Barre Railway Company and of Mill street over the tracks of the Central Railroad Company of New Jersey, and the proposed tracks of the Wilkes-Barre Connecting Railroad Company. The hearings and investigations developed the fact that the most practicable and feasible plan for the abolition of these crossings was by a relocation of both crossings upon the viaduct to be erected over the facilities of the two railroad companies, and the transference thereto of the traffic heretofore accommodated by the public and the private grade crossings mentioned.

This determination having been reached, the Commission directed that plans be prepared for the construction of such a viaduct, estimates be made of the cost of said construction, and the damages to property incident thereto be ascertained. These plans were duly prepared and, after public hearing, notice of which was duly given to all parties in interest, including the owners of adjacent property, the Commission determined upon the abolition of the existing grade crossings of the facilities of the Wilkes-Barre Railway Company and of Mill street over the tracks of the Central Railroad Company of New Jersey, and the proposed tracks of the Wilkes-Barre Connecting Railroad Company, and the relocation

of said crossings upon the viaduct above mentioned, in accordance with the plans and specifications approved by the Commission.

Hearings were held in accordance with the Public Service Company Law to determine the compensation for damages which the owners of adjacent property taken, injured or destroyed will sustain in the construction, re-location, alteration or abolition of the crossings involved, and the proportions of the cost of construction and of said damages which should be paid by the parties interested in the proposed improvement.

The Commission finds and determines that in the construction of the said crossing and in the abolition of the existing grade crossings it is necessary or proper to take or injure the following described pieces of land, and, by this determination, hereby does take the said pieces of land for the purpose of said crossings, and ascertains and determines the amounts hereinafter set forth as the compensation for said damages:

(1) Lands in the Borough of Miners Mills, Luzerne County, Pennsylvania—Beginning

[Here follows a description of the property as found in Deed Book No. 424, p. 109, Luzerne County.]

Containing 1,655 sq. ft. of land, be the same more or less. Coal reserved.

Being the property of Thomas Snapko or Joseph Paczkowski, to the owner of which the Commission ascertains and determines that there is due no damages, for the reason that any injury or damage is offset by the benefits of said improvement.

(2) Lands in Miners Mills Borough, Luzerne County, Pennsylvania, beginning

[Here follows a description of the property.]

Containing 225 sq. ft. of land, be the same more or less. Coal reserved.

Being the property of the Asher Miner Hose Company, to the owner of which the Commission ascertains and determines that there is due, as compensation for damages for property taken, injured or destroyed, the sum of \$60.00.

(3) Lands in Miners Mills Borough, Luzerne County, Pennsylvania—Beginning

[Here follows a description of the property.]

Containing 8,321 sq. ft. of land, be the same more or less. Coal reserved.

Being the property of the Miner-Hillard Milling Company, to the owner of which the Commission ascertains and determines that there is due, as compensation for damages for property taken, injured or destroyed, the sum of \$2,010.00.

(3-a) Also a certain lot situate in the Borough of Miners Mills, Luzerne County, Pennsylvania, having a front of 200 feet more or less on the easterly side of Mill street and extending back a depth of 75 feet more or less to the property of the Wilkes-Barre and Suburban Street Railway Company and to Mill creek.

Being the property known and described as the "Johns Lot" and being now owned by the Miner-Hillard Milling Company, to the owner of which the Commission ascertains and determines that there is due, as compensation for damages for property taken, injured or destroyed, the sum of \$680.00.

(4) Lands in Miners Mills Borough—Beginning

[Here follows a description of the property as found in Deed Book, No. 463, p. 202, Luzerne County.]

Containing 11,136 sq. ft. of land, be the same more or less. Coal reserved.

Being the property of Evan Price, to the owner of which the Commission ascertains and determines, that there is due, as compensation for damages for property taken, injured or destroyed, the sum of \$8,625.00.

(5) Land in Miners Mills Borough—Beginning

[Here follows a description of the property.]

Containing 4,500 sq. ft. of land, be the same more or less. Coal reserved.

Also one other piece or parcel of land situate in Miners Mills Borough, being a strip of land 25 feet in width and lying equal distance on the both sides of a centre line described as follows:—

[Here follows a description of the property.]

Also one other piece of land, situate in Plains Township, beginning

[Here follows a description of the property.]

Being the property of the Wilkes-Barre and Suburban Street Railway Company, to the owner of which the Commission ascer-

tains and determines that there is due, as compensation for damages for property taken, injured or destroyed, the sum of \$5,-465.00.

(6) Beginning

[Here follows a description of the property as found in Deed Book No. 405, p. 322, Luzerne County.]

Being the property of the Hudson Coal Company, to the owner of which the Commission ascertains and determines that there is due, as compensation for damages for property taken, injured or destroyed, the sum of \$215.00.

(7) Beginning

[Here follows a description of the property.]

Containing 13,500 square feet of land, be the same more or less, and being part of a larger tract of land conveyed by Marcus Smith and Wife to the Wilkes-Barre Connecting Railroad Company by deed April 14, 1913, and recorded in Deed Book 491, Page 213.

Being the property of the Wilkes-Barre Connecting Railroad Company, to the owner of which the Commission ascertains and determines that there is due, as compensation for damages for property taken, injured or destroyed, the sum of \$1,314.00.

(7-a) The surface or right of soil of all that certain piece or parcel of land situate, lying and being in the Township of Plains, Luzerne County, and State of Pennsylvania, bounded and described as follows, to-wit:

[Here follows a description of the property as found in Deed Book, No. 487, p. 451, Luzerne County.]

Containing 900 sq. ft. of land, be the same more or less.

Being the property of the Wilkes-Barre Connecting Railroad Company, to the owner of which the Commission ascertains and determines that there is due, as compensation for damages for property taken, injured or destroyed, the sum of \$50.00.

(8) The surface or right of soil of all that certain piece or parcel of land situate, lying and being in the Township of Plains, County of Luzerne and State of Pennsylvania, bounded and described as follows, to-wit:

[Here follows a description of the property as found in Deed Book, No. 444, p. 458.]

Containing 1,800 sq. ft. of land, be the same more or less.

Being the property of John Thompson, to the owner of which the Commission ascertains and determines that there is due as compensation for property taken, injured or destroyed, the sum of \$420.00.

(9) The surface or right of soil of all that piece or parcel of land situate, lying and being in the Township of Plains, County of Luzerne, State of Pennsylvania, bounded and described as follows, to-wit:

[Here follows a description of the property as found in Deed Book No. 496, p. 247, Luzerne County.]

Containing 4,640 sq. ft. of land, be the same more or less.

Being the property of Michael Mozola, to the owner of which the Commission ascertains and determines that there is due, as compensation for property taken, injured or destroyed, the sum of \$600.00.

(10) The surface or right of soil of all that certain piece or parcel of land situate in the Township of Plains, County of Luzerne, State of Pennsylvania, bounded and described as follows, to-wit:

[Here follows a description of the property as found in Deed Book No. 345, p. 215, Luzerne County.]

Containing 1,540 sq. ft. of land, be the same more or less.

Being the property of Jacob Hinz, to the owner of which the Commission ascertains and determines that there is due as compensation for the property taken, injured or destroyed, the sum of \$200.00.

(11) The surface or right of soil of all that piece or parcel of land situate, lying and being in the Township of Plains, County of Luzerne, Pennsylvania, bounded and described as follows, to-wit:

[Here follows a description of the property as found in Deed Book No. 429, p. 63.]

Containing 943 sq. ft. of land, be the same more or less.

Being the property of Mary Zukowski, to the owner of which the Commission ascertains and determines that there is due, as compensation for property taken, injured or destroyed, the sum of \$100.00.



(12) The surface or right of soil of all that piece or parcel of land situate, lying and being in the Township of Plains, County of Luzerne, State of Pennsylvania, bounded and described as follows:

[Here follows a description of the property as found in Deed Book No. 487, p. 343.]

Containing 500 sq. ft. of land, be the same more or less.

Being the property of Andrew Checonowski, to the owner of which the Commission ascertains and determines that there is due, as compensation for property taken, injured or destroyed, the sum of \$100.00.

(13) The surface or right of soil of all that certain piece or parcel of land situate, lying and being in the Township of Plains, County of Luzerne and State of Pennsylvania, bounded and described as follows, to-wit:

[Here follows a description of the property as found in Deed Book No. 454, p. 549 and No. 475, p. 382.]

Containing 1,125 sq. ft. of land, be the same more or less.

Being the property of Mary Martynkowski, to the owner of which the Commission ascertains and determines that there is due, as compensation for property taken, injured or destroyed, the sum of \$100.00.

(14) The surface or right of soil of all that certain piece or parcel of land situate, lying and being in the Township of Plains, County of Luzerne, State of Pennsylvania, bounded and described as follows, to-wit:

[Here follows a description of the property.]

Containing 2,750 sq. ft. of land, be the same more or less.

Being the property of William Rutledge, to the owner of which the Commission ascertains and determines that there is due, as compensation for property taken, injured or destroyed, the sum of \$200.00.

(15) The surface or right of soil of all that certain piece or parcel of land situate, lying and being in the Township of Plains, County of Luzerne, and State of Pennsylvania, bounded and described as follows, to-wit:

[Here follows a description of the property.]

Containing 3,900 sq. ft. of land, be the same more or less.

Being the property of Thomas J. Hughes, to the owner of which the Commission ascertains and determines that there is due, as compensation for property, taken, injured or destroyed, the sum of \$400.00.

(16) The surface or right of soil of all that piece or parcel of land, situate, lying and being in the Township of Plains, County of Luzerne and State of Pennsylvania, bounded and described as follows, to-wit:

[Here follows a description of the property as found in Deed Book No. 546, p. 17, Luzerne County.]

Containing 425 sq. ft. of land, be the same more or less.

Being the property of Morgan Bevan, to the owner of which the Commission ascertains and determines that there is due, as compensation for property taken, injured or destroyed, the sum of \$15.00.

The leasehold estate of Peter Begonas in all that certain piece of property described at No. 4 above and being more specifically described in a certain lease presented by said Begonas, the term of which expires on the first day of April, 1917, to the owner of which lease the Commission ascertains and determines that there is due, as compensation for damages to property taken, injured, or destroyed, the sum of \$600.00.

The Commission hereby ascertains and determines that the compensation for the above described damages for property taken, injured and destroyed, in said improvement, is the sum of \$21,154. After investigation and hearing it is estimated that the cost of construction of the proposed improvement will be \$61,520, making the total cost of the construction and the damages incident thereto \$82,674.00.

In determining the proportionate contribution to the above mentioned total expense of the proposed improvement, the Commission has taken into consideration the importance of the service rendered or to be rendered to the public by the various public service companies interested and the benefits which will be derived from said construction by the companies, as well as by the public. The safety of the public using Mill street as a crossing and the safety of the operation of the existing crossing of the tracks of the Wilkes-Barre Railway Company over the tracks of the Cen-

tral Railroad Company of New Jersey have been given due weight by the Commission in this determination. The proposed construction will afford to the general public, as well as to the users of the Wilkes-Barre Railway Company, a crossing which will be for all time safe and adequate and will eliminate dangers which, in the opinion of the Commission, existed in the operation of the two crossings under the conditions presented by the testimony in this case. The fact that the grade crossing of the railway company over the tracks of the Central Railroad Company of New Jersey has existed for a number of years and that no accident has occurred at said crossing has been taken into consideration by the Commission in proportioning the amount which shall be paid by the Wilkes-Barre Railway Company in eliminating a condition which the Commission considers unsafe and capable of change without undue expense being put upon the railway company. The fact that a grade crossing has existed for a number of years does not justify its continuance where its elimination can be accomplished without burdening the public service company with an unreasonable expense.

Likewise, the improvement in the facilities which the proposed viaduct will give to the residents of Miners Mills is deemed of such importance that the Commission is of the opinion that the Borough of Miners Mills should contribute to the cost of the abolition of the Mill street crossing and the substitution thereof of the new viaduct.

The Central Railroad Company of New Jersey will, by the improvement proposed, be relieved of two crossings at grade within a short distance of each other, and the Commission is, therefore, of the opinion that it should contribute a reasonable amount to the expense of the improvement.

The Wilkes-Barre Connecting Railroad is being constructed for the purpose of removing from the congested streets of the City of Wilkes-Barre a large amount of traffic which has for a number of years rendered crossings in this city very dangerous. A large number of trains will be run by said railroad over the tracks which it proposes to construct at the places involved in the crossings in Miners Mills. The necessity and desirability of constructing the Wilkes-Barre Connecting Railroad are clearly set out in

the petition filed in this case and are fully sustained by the testimony produced at the hearings. The railroad company adopted its route and determined its grade in the district involved with full knowledge that its alignment would be such as to make it necessary either to aggravate the conditions at the two crossings mentioned or to provide some substitute for these crossings. While the Commission is not of the opinion that the Wilkes-Barre Connecting Railroad Company should, for this reason, be forced to pay the entire cost of this improvement, which will benefit both the other public service companies and the municipality, it is of the opinion that, in view of the priority of location of the other public service companies and in view of the facts above mentioned, the applicant should reasonably be called upon to bear the greatest part of the expense which the Commission finds it necessary to assess in order to render the operation of all the public service companies safe and efficient.

Having carefully considered all the facts brought to its attention by the testimony, and having given due weight to the reasons advanced by all of the parties on the subject of the distribution of the expense of this improvement, the Commission is of the opinion and finds and determines that the expense of the said construction, re-location, alteration and abolition of the crossings mentioned, including the compensation for damages to property taken, injured and destroyed, shall be borne and paid by the parties interested in the following proportions: -

Ten per cent. of the said amount, by the Wilkes-Barre Railway Company;

Eighty-one per cent. by the Wilkes-Barre Connecting Railroad Company;

Eight per cent. by the Central Railroad Company of New Jersey;

One per cent. by the Borough of Miners Mills.

The Commission is also of the opinion, and hereby orders and directs, that the Wilkes-Barre Connecting Railroad Company shall proceed to do the whole of the work connected with the construction of the proposed viaduct in accordance with the plans and specifications approved by the Commission and now on file at its office in the City of Harrisburg, and shall report monthly to

the Chief of the Bureau of Engineering of The Public Service Commission the progress made in the construction of the said improvement.

ORDER.

The matter of the existing grade crossings of the facilities of the Wilkes-Barre Railway Company and of Mill street over the tracks of the Central Railroad Company of New Jersey in Miners Mills Borough having been brought to the attention of the Commission by a petition of the Wilkes-Barre Connecting Railroad Company, and the hearings held thereon, and the Commission having, after investigation and hearings, made a finding and determination in relation to said crossings and having adopted plans and specifications for the abolition of said crossings and the construction of a new crossing over the facilities of the said Railroad Company of New Jersey and the Wilkes-Barre Connecting Railroad, all of which more fully appears in the aforesaid finding and determination which is hereby referred to and made a part of this order:

*Now, to-wit, January 22d, 1915, It is ordered:*

*First:* That the Wilkes-Barre Connecting Railroad Company proceed forthwith to construct the viaduct over the facilities of the Central Railroad Company of New Jersey and the Wilkes-Barre Connecting Railroad Company, in accordance with the plans and specifications referred to in said finding and determination and now on file with the Chief of the Bureau of Engineering of The Public Service Commission of the Commonwealth of Pennsylvania, a copy of which plans and specifications are hereto attached.

*Second:* That the Wilkes-Barre Connecting Railroad Company report monthly to the Chief of the Bureau of Engineering of The Public Service Commission the progress made in the construction of said viaduct.

*Third:* That the parcels or pieces of land mentioned in said finding and determination be and the same hereby are taken for the construction of said improvement and the amounts set forth in said finding and determination are hereby ascertained and de-

terminated as damages for said property taken, injured or destroyed.

*Fourth:* That the Wilkes-Barre Railway Company pay ten per cent. of the total cost, including the damages awarded to the owners of adjacent property;

• *Fifth:* That the Wilkes-Barre Connecting Railroad Company pay 8½ per cent. of the total cost, including the damages awarded to the owners of adjacent property;

*Sixth:* That the Central Railroad Company of New Jersey pay 8 per cent. of the total cost, including the damages awarded to the owners of adjacent property;

*Seventh:* That the Borough of Miners Mills pay 1 per cent. of the total cost, including the damages awarded to the owners of adjacent property.

*Eighth:* That each of the parties interested, assessed with a portion of the cost of said improvement, shall pay its proportion of the amounts ascertained and determined by the Commission, or by the proper authorities on appeal, as damages for property taken, injured or destroyed, to the parties entitled thereto, and the balance of the total cost to the Wilkes-Barre Connecting Railroad Company, in conformity with any contracts of the said railroad company providing for said construction and upon monthly estimates furnished by the Engineer of the Wilkes-Barre Connecting Railroad Company and approved by the Chief of the Bureau of Engineering of The Public Service Commission.

*Ninth:* That the existing grade crossings of the Wilkes-Barre Railway Company and of Mill street over the tracks and facilities of the Central Railroad Company of New Jersey and the Wilkes-Barre Connecting Railroad Company shall be abolished at such time during the construction of the above mentioned improvement as shall seem best for the safety of the public, in the opinion of The Public Service Commission.

By the Commission,  
SAM'L W. PENNYPACKER, *Chairman.*

## APPLICATION OF THE RAYSTOWN WATER POWER CO.

*Approval of contracts—Street lighting—Ordinance passed prior to July 26, 1913—Competition.*

The applicant, the Raystown Water Power Company, asks approval of a contract between it and the Borough of Mount Union, for supplying street lighting in the said borough. By virtue of an ordinance passed by council and approved July 16, 1913, advertised once in two newspapers on July 22 and 24, and recorded in the ordinance book prior to July 26, 1913, the day when the Public Service Company Law went into effect, the applicant entered the borough and erected poles and wires for the supply of power. Said ordinance, however, did not permit it to furnish electricity for light prior to April 1, 1915. Since the entry of the applicant the borough council advertised for bids for street lighting after April 1, 1915, and awarded the contract to the applicant, and it is this contract for which approval is asked.

The Penn Central Light & Power Company protests, alleging that it has been supplying street lighting in said borough since 1905, that it has invested \$2,900 in the necessary facilities, that its service has been satisfactory, that the applicant cannot furnish adequate service and that the ordinance of July 16, 1913, is invalid because its advertisement was not completed until after July 26, 1913, and it has not been approved by the Commission.

The evidence shows that the applicant's bid for the contract was lower than that of the protestant, that it can furnish adequate service, that the facilities used by the protestant in the said borough can be used elsewhere and hence will not be lost to the protestant.

*Held:* 1. The ordinance of July 16, 1913, is valid. Substantially all things were done by the borough prior to July 26, 1913, which were necessary to make the ordinance a valid one, and it did not therefore require the approval of the Commission.

2. As no great loss will be suffered by the protestant, and as the borough authorities in the reasonable exercise of their discretion awarded the contract to the applicant, the application should be approved.

3. Whether or not the bid advertised contained a specification not strictly in accord with the letter of the law in asking bidders to submit rates for domestic consumption is a juridical question and not an administrative one, and is beyond the jurisdiction of the Commission.

## MUNICIPAL CONTRACT DOCKET No. 388—1914.

Filed December 16, 1914.

Decided March 19, 1915.

Report and Order of the Commission.

COMMISSIONER BRECHT:

On the 16th of December, 1914, the Raystown Water Power

Company filed an application for the approval of a contract entered into with the Borough of Mount Union for lighting the streets of said borough with nitrogen filled mazda lamps for a period of ten years from April 1, 1915. This contract, it was set forth in the petition, was made in pursuance to an ordinance enacted by the Borough of Mount Union on July 16, 1913. It is alleged that the aforesaid ordinance was duly advertised and recorded according to law before the act creating the Public Service Commission went into effect on July 26, 1913.

A protest was entered against the approval of the proposed contract by the Penn Central Light and Power Company, alleging inter alia that the respondent [protestant] and "its predecessors have been furnishing light" for the purpose of lighting the streets of Mount Union Borough since about April, 1905, that its service so far as it knows "is satisfactory to the said borough," that it has invested in special facilities in the borough in question to the amount of \$2,900.00, which will be lost if the proposed contract is approved, that the ordinance of July 16, 1913, was not properly advertised until after July 26, 1913, and therefore was not valid until approved by the Public Service Commission, that the Raystown Water Power Company cannot without "expending a very large sum of money furnish and maintain . . . reasonably adequate" service for the accommodation and safety of its patrons and the public, and that "according to the information received by the respondent [protestant], the acceptance of the bid of the Raystown Water Power Company . . . was not fair and just to the respondent [protestant]."

On July 24, 1914, the Borough of Mount Union, as is shown by the record in this case, advertised that the borough secretary will receive sealed bids until August 3, at 2:00 p. m., for all sizes and styles of arc lights and incandescent lights to light the streets of Mount Union Borough, "said bids to include a maximum price for furnishing lights and power for residences, stores and all commercial purposes in Mount Union Borough." Two bids were received by the secretary, one from the Raystown Water Power Company, the other from the Penn Central Light and Power Company. On November 5, 1914, at a meeting of the borough council, the secretary opened and read the bids before that body, and council by



a yea and nay vote, unanimously carried, awarded the contract to the Raystown Water Power Company.

It appears from the minutes of that meeting of council that the bid of the petitioner was accepted because the respondent [protestant] company did not comply with the terms of the published request for bids relating to price or rates for furnishing light and power to private consumers, and further because "the services of the Penn Central Light and Power Company for street lighting purposes have not been satisfactory in the past." Testimony was also offered, showing that the rates offered by the Raystown Company were respectively 50 cents and 35 cents lower per year on the two types of lamps adopted. Accordingly, on November 20, 1914, a contract for lighting the streets of the Borough of Mount Union was entered into by and between the petitioner and the said borough, which was properly advertised and is now pending before this Commission for approval. Whether, as respondent [protestant] contends, the bid advertised contained a clause or specification not strictly in accord with the letter of the law, when it asked for rates for domestic consumption, is a juridicial rather than an administrative question, and as such does not fall within the purview of this Commission's jurisdiction. In awarding a municipal contract, it may however be said that the authorities making such award are vested with certain discretionary powers which they are expected to exercise whenever they are called upon to adopt a course of action that is designed to promote the best interests of the municipality.

The Penn Central Light and Power Company is now furnishing light to the Borough of Mount Union under a five-year contract which will expire on April 1, 1915. The present contract was acquired by the Penn Central Company about a year and a half ago when that corporation bought the Mount Union Light and Power Company, which had been furnishing service theretofore in the town of Mount Union. When the respondent [protestant] learned that the contract for lighting the Borough of Mount Union after April 1, 1915, had been given to the petitioner, it notified the borough authorities that it was willing to meet the rate of the Raystown Water Power Company, and accordingly, in its communication, offered to furnish service at the same price per lamp.

The original franchise-ordinance, on which the contract pending in this proceeding is based, was passed July 16, 1913. By that ordinance, the Raystown Water Power Company was given the right to erect poles and wires and other facilities for the transmission of power in the Borough of Mount Union, but was not permitted under its provisions to enter into competition in the sale of electricity for lighting purposes, public or private, until the first day of April, 1915.

In the course of developing its business to supply power in that immediate territory, the Raystown Company found it necessary to cross the transmission lines and facilities of the Penn Central Company. Application was made to this Commission for the privilege to cross under the rights conferred upon the petitioner by the ordinance of July 16, 1913. After a hearing held on the matter, this Commission issued on March 5 and September 3, 1914, two Certificates of Public Convenience for crossings under the said ordinance, restricting the privilege however, to lines furnishing power only, and not allowing it for transmission service supplying light. There was no question raised at the time the application was heard for the crossings, as to the legal status of the ordinance of July 16, 1913, and as the right to furnish power was expressly granted and the right to furnish light before April 1, 1915, denied by the language of the franchise, the Commission, after a careful consideration of the merits of the case, issued its decrees in conformity with the provisions of the ordinance aforesaid.

It is now averred by respondent [protestant] that subsequent investigation has developed the fact that the original ordinance did not become effective until after July 26, 1913, the day the Public Service Company Law went into effect. From the evidence on the record it appears that the ordinance book of the borough shows some discrepancy in the date of entry of the secretary's certificate, giving August 8 as the day of entry instead of the day and date in July, when the entry was actually made. The secretary in testifying, explained the error by stating that all of the certificate was recorded within a day or two after the ordinance was passed excepting the blank space reserved for the date, which he did not expect to enter until the ordinance had been

advertised weekly for the third time. The Commission at the hearing asked for copies of the newspapers in which the ordinance was published first, and received copies of one newspaper, and the affidavit of the editor of another paper, which established the fact that the ordinance was first advertised in the one paper on July 22, 1913, and in the other on July 24, 1913.

From the facts ascertained it appears that the franchise in question was recorded in the borough ordinance book with the certificate of the secretary within a week after its enactment and published in a local newspaper on July 22, 1913. But we think that the ordinance of July 16, 1913, having been passed by the borough council on July 11, 1913, and duly approved July 16, 1913, and advertised July 22, 1913, and recorded prior to July 26, 1913, all things were done by the borough which substantially were required by law to be done to make said ordinance a valid one, prior to July 26, 1913, when the Public Service Company Law became effective. Therefore, it is our opinion that it cannot be held that said ordinance is within the terms of the Public Service Company Law requiring the approval of the Commission. The Raystown Water Power Company, therefore, is duly empowered upon the approval of this application to enter upon and occupy the streets and highways of the Borough of Mount Union for the purpose of furnishing municipal lighting in the said borough, as set forth specifically in the ordinance of July 16, 1913.

As it appears from the record the Raystown Water Power Company is an operating company actively engaged in furnishing light and power at Huntingdon, Williamsburg and other municipalities in the Counties of Huntingdon, Mifflin and Blair. In addition to extensive transmission facilities, it has constructed a large dam upon the Raystown Branch of the Juniata river for the generation of hydro-electric power, which according to the testimony of the secretary of the company, has a capacity of 3,900-horse power.

The water plant is reinforced by an auxiliary steam plant fourteen miles from the dam, in which is installed a vertical 500-kilowatt turbine. The maximum peak load on the line is never over 800-kilowatts, but its installation capacity is sufficient to develop a much greater load. Both the water and steam plant are protected by the best type of electric lighting arresters, and modern

switches and regulators. The company has poles and other facilities erected in Mount Union Borough to distribute power, and has transmission lines running to and through the said borough. Recently it erected a sub-station at Mapletown, which the secretary contends will enable the company "to give perfectly good service in Mount Union."

Some testimony was offered by respondent designed to show that the service of the Raystown Water Power Company wherever it furnished light, was poor and inadequate. Recording voltmeter charts taken by respondent from the petitioner's service at Williamsburg, Huntingdon and Mount Union were submitted to show that the fluctuation in the voltage is over 5%, and a violation of the rule established by the Commission which should govern or define the limits of the variation in the flow or continuity of current. The charts submitted show at Mount Union a fluctuation ranging from 9% to 20%, while at Huntingdon and Williamsburg, the ebb and flow of the current varied from 18% to 40% and 50%.

It appeared however that these records were taken during the three or four months of extreme low water occasioned by the prolonged drought which prevailed during the late summer and fall of 1914, and during the time the petitioner was installing its steam plant to relieve such an exigency as then existed. A record taken at the request of the Commission on a recording voltmeter during the three days in January, 1915, by the petitioning company at its office, which is said to be a considerable distance from the 2,200 volt sub-station, and to represent the average service rendered, shows an even voltage, and only a short interval of disturbance in the current at the time when the street lighting circuit is thrown off and on the lines.

One witness was produced from Mount Union who testified that the service furnished by petitioner at his place of business was wholly unsatisfactory during the late summer and fall of 1914, insomuch that he was obliged to change service and get his light from the Penn Central Company. On the other hand, quite a number of citizens from Mount Union and Huntingdon testified that the service of the Raystown Water Power Company has been better and more satisfactory than that obtained from the

Penn Central Company. In the municipalities served by the two companies, the number of outages appear to be substantially the same for each company; and the service, so far as could be determined from the testimony, is practically of the same general character and efficiency in the two companies in interest in this proceeding. There was no evidence presented to indicate that the Raystown Company would not be able at a comparatively small expense to furnish adequate service at Mount Union under its present equipment, throughout the year.

The respondent has physical property in the Borough of Mount Union amounting approximately to \$2,900.00, which it contends would be lost or rendered valueless if this contract is approved. Under cross examination of the operating manager of the Penn Central Company, it was shown that this estimate is made up of one-third of the value of the sub-station building, which is also used in the business of serving domestic light and power, the physical equipment consisting of poles, wires, cross-arms, (used only in supplying street lighting), current transformer and switch-board (used exclusively for the arc light service), Anderson time clock, 2,300-volt control switch-board panels, other auxiliary apparatus, and the general cost of installing the equipment.

In the foregoing valuation, the current transformer brought second-hand from the respondent's Huntingdon plant, was estimated at \$527.00 and can very likely be installed again elsewhere; the wires and poles, which were reckoned to suffer a depreciation of \$843.00, can be used by the company again in plant extension or replacement somewhere else; the sub-station, against which a loss of \$170.00 was charged, will remain and be utilized in furnishing service for domestic lighting; the lamps, against which there was placed a depreciation charge of \$674.00, can be installed and used in the service again; and in a similar manner the balance of the property loss of \$2,900.00 is made up of items that can be used further in the conduct of the business. The property enumerated in this inventory can therefore not be regarded in the light of a total loss to the company if no longer used in the business of municipal lighting in the Borough of Mount Union.

Furthermore, both the petitioning and respondent companies are operating in competition in supplying commercial and domestic

lighting throughout an extent of territory embracing several counties, and have been doing so for a considerable length of time. It is not a new experience for either of these companies to displace the other in its business from time to time, as the contracts of the various municipalities expire. About a year and a half ago the Raystown Company secured the contract at Huntingdon, thereby displacing the Penn Central Company, which had been operating in that particular municipality before.

By reason of the extensive territory in which both these companies are established and doing business, the plant equipment employed in a small community like Mount Union represents only a fractional part of the property valuation of the operating company, and therefore the loss of the business at such a point cannot be regarded as affecting seriously the revenues of the company, or the values of the holdings of the general public in such a plant. Consequently, whether the contract-franchise now pending be approved or not, the two companies concerned in this proceeding will continue to do a competitive business throughout that territory in substantially the same manner and with practically the same property equipment and earning capacity as heretofore. Under the specific facts that obtain in this case, it may be justly held that the property values of the respondent company are not materially disturbed or injured, that the investment of the general public in the bonds and stocks of the said company is properly protected and safeguarded, and that the character and efficiency of the service rendered will not be impaired if the contract of the petitioner be approved.

An order will be made that the contract be approved, and a Certificate of Public Convenience issued.

#### ORDER.

This case being at issue upon petition and protest on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its finding of facts and conclusions thereon, which said report is hereby referred to and made a part hereof:

Now, to wit, March 19, 1915, it is ordered: That the contract between the Raystown Water Power Company and the Borough of Mount Union, dated November 24, 1914, for lighting the streets of said borough be and the same is hereby approved and a Certificate of Public Convenience be issued evidencing the Commission's approval thereof.

By the Commission,  
SAM'L W. PENNYPACKER, *Chairman*.

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#### APPLICATION OF THE POTATO CREEK GAS CO.

##### *Approval of incorporation—Amendment of articles.*

Petitioner proposes to supply natural gas in a territory composed of four counties in a part of one of which the protestant is operating. Protestant asks that the articles of incorporation of the proposed company be so changed as to prohibit its entering into the territory of the protestant.

*Quere:* Whether the Commission has power in effect to amend the charter of a corporation upon proceedings for the approval of its incorporation.

*Held:* Under the circumstances of this case the application should be approved.

APPLICATION DOCKET NO. 10—1915.

Decided March 19, 1915.

Report and Order of the Commission.

#### COMMISSIONER GAITHER:

The Potato Creek Gas Company petitions for a Certificate of Public Convenience, evidencing the Commission's approval of its incorporation. To this the Norwich Oil and Gas Company files objections and asks that the Commission restrict the corporate rights and franchises of the Potato Creek Gas Company which according to the Certificate of Incorporation cover all the territory comprised within the Counties of McKean, Elk, Potter and Cameron, so as to exclude from such chartered territory, Norwich Township, in McKean County, where the protestant is supplying natural gas to the public.

Although we do not now expressly decide the point, we are much inclined to the opinion that the Public Service Company Law does not confer upon the Commission the power thus in effect to

amend the charter of a corporation upon proceedings for the approval of its incorporation.

Assuming, however, our power to be as claimed by the Norwich Oil and Gas Company, protestant, we think that, under all the facts and circumstances as shown by the record and developed by the evidence at the hearing, the Certificate of Public Convenience, approving the incorporation, should issue as prayed for, carrying with such incorporation the general right of said company to carry on its business in the territory specified in its charter, or Certificate of Incorporation, subject, however, to the several provisions of the Public Service Company Law.

The record shows that the purpose of the petitioner is to supply natural gas for manufacturing and fuel purposes. Its capital stock is \$50,000, of which \$25,000 has been subscribed and \$6,250 paid in. The protestant company is organized under the laws of Delaware and has since July 14, 1908, been operating in Norwich Township, McKean County, and part of the territory in which the petitioner asks permission to transact business. The protestant claims to have invested \$46,000 in its business, and is now supplying about 1,560,000 feet of gas per month to 140 consumers.

As to whether or not the application of the petitioning company for incorporation be approved or disapproved in its entirety, considerable testimony was taken, and the matter resolved itself into the fundamental question as to whether this Commission should anticipate the sufficiency or insufficiency of gas of future developments, drilling now being carried on by the petitioner. It is apparent that the protestant company does not object to the Potato Creek Gas Company's going into the business of selling gas to the wholesale trade.

The protestant corporation offered evidence, gathered from experience and existing geological conditions where the petitioner is now operating, as tending to show that a supply only sufficient to interfere with its rights may be found, and not enough to warrant the Potato Creek Gas Company to find sale for its gas outside of Norwich Township. There is no denial that there is a ready market, in the vicinity named, for gas, aside from the consumers the Norwich Gas Company is now supplying.

The finding of natural gas either within or outside of the limits



of a so-called belt is to a very great extent problematical, and it would also be unreasonable to assume that the petitioner would drill ten wells, as it was contracted to do, at a cost of \$25,000, without some encouragement as to a prospective development larger than would justify it in even attempting to interfere with the present rights of the Norwich Gas Company.

Under all the circumstances as shown by the record, we think the Certificate of Public Convenience, approving the incorporation of the Potato Creek Gas Company, should issue.

**ORDER.**

This case being at issue on petition and protest on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

Now, to wit, March 19, 1915, it is ordered: That a Certificate of Public Convenience be issued evidencing the Commission's approval of the incorporation of the said Potato Creek Gas Company.

By the Commission,

SAM'L W. PENNYPACKER, *Chairman.*

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**COMMONWEALTH v. IMPERIAL WINDOW GLASS COMPANY.**

***Foreign corporations—Bonus on capital employed in this state.***

A foreign corporation doing business in Pennsylvania is liable for bonus upon the amount of its capital actually employed wholly within this state. This does not include proceeds of sales on deposit in banks nor money due from sales made.

Appeal from settlement of bonus on capital employed in the State. C. P. Dauphin County. No. 27, Commonwealth Docket, 1912.

*Wm. M. Hargest*, Asst. Deputy Attorney General for the Commonwealth.

*Geo. M. Hosack*, for defendant.

McCARRELL, J., March 12, 1915.

The defendant is a corporation of West Virginia, and did business in this State from January 1, 1910, to November 14, 1910. Its liability to pay a bonus is admitted, and the only question is as to the amount of capital upon which the bonus is to be computed. Trial by jury has been duly waived in pursuance of the provisions of the Act of March 22, 1874. From the testimony submitted we find the following:

#### STATEMENT OF FACTS.

The defendant is a corporation chartered by the State of West Virginia April 14, 1909, for the purpose of buying and selling glass at wholesale. The capital paid in as of November 1, 1910, was \$170,300. The business done in Pennsylvania represents about one-third of its entire business. It made contracts to take the entire product of several glass manufactories. It paid therefor partly in cash and partly by notes at three months without interest. The total amount of the purchases from January 1, 1910, to November 14, 1910, was \$294,976.25, and the glass purchased was stored at various places in Pennsylvania until sold, the time of the storage being from four to six weeks. The property so purchased and stored was constantly varying in quantity and no testimony was offered to show the average monthly value of the property so held and stored for the purposes of its business. The value of the furniture and office equipment in Pittsburgh was \$3,000. It appears that four different settlements were made for bonus against the defendant company. The first was September 7, 1911, on the basis of the employment of capital in the State to the amount of \$799,728, for a bonus of \$2,665.76. A second settlement also on September 7, 1911, was made upon \$809,728, for a bonus of \$3,373.86. A third settlement on November 14, 1911, was made upon \$86,303, for ten months of 1910, and one-half month of the tax year of 1911 for a bonus of \$377.57. This settlement in express terms supersedes the settlement of September 7, 1911, for \$3,373.86. A fourth settlement was made November 14, 1911, on \$427,174 for bonus of \$1,423.91. This settlement expressly supersedes the settlement of September 7, 1911, for \$2,665.76. The settlement of November 14, 1911, for \$1,423.91 is the one filed with the appeal in this case. The settle-

ment of November 14, 1911, on \$86,303 for \$377.57, does not appear to have been expressly superseded, although the settlement for \$1,423.91 of the same date has apparently been substituted for it. A supplemental report was filed by the defendant company on November 8, 1911, in which, after giving certain figures in detail, it is expressly stated that the actual cash value of property in this State liable for taxation is \$86,383.45. The same statement is contained in the affidavit of the secretary offered in evidence at the hearing, in which affidavit it is further stated that this sum is "the actual book value of the capital stock of the company applicable to its Pennsylvania business." This testimony is uncontradicted. The bonus upon this value is \$287.94.

#### DISCUSSION.

The settlement upon the value of \$427,174.42 for bonus of \$1,423.91 is the one appealed from here. This value, as appears from the supplemental report of November 8, 1911, and the testimony of the secretary, is the total amount of the cash and current assets for the year. It includes the total value of the glass purchased, \$294,976.25. It also includes money received from sales made and deposited in Pennsylvania banks subject to check, \$106,656.63, as also money due from sales but uncollected, \$22,541.54. The bonus is imposed by our statute upon the capital actually employed wholly within the State. This settlement includes proceeds of sales on deposit in banks and money due from sales made. That these items, amounting in this instance to \$129,197.17, cannot properly be considered as capital employed within the State has been settled by the case of *Comm. vs. G. W. Ellis Pub. Co.*, 237 Pa. 328. The amount upon which the bonus is computed in this settlement also includes the value of all the glass purchased, amounting to \$294,976.25. The testimony does not indicate the dates or amounts of the various purchases and stored within the State until sold. It appears, however, that the storage does not continue for more than four to six weeks. This amount appears to be the aggregate of the purchases made by the defendant company during the year, and there is no information as to the value of the property purchased at any particular date. It has not been definitely shown what amount of capital

was actually employed wholly within the State. It may be that the amount of the purchases were about the same each month, which would indicate a monthly purchase amounting to \$24,581. In the absence of testimony offered by the Commonwealth as to the amount of capital actually employed by the defendant company wholly within the State, we look to the testimony offered by the defendant. This consists of the supplemental report to the accounting officers, made November 8, 1911, and the affidavit of the secretary. In this supplemental report it is expressly stated that the actual cash value of property in the State liable for taxation is \$86,383.45. In the affidavit of the secretary it is expressly stated that "the actual book value of the capital stock of the company applicable to its Pennsylvania business" is \$86,383.45. These statements are uncontradicted by any testimony offered in behalf of the Commonwealth, and are equivalent to an admission by the defendant company that this is the amount of capital employed in Pennsylvania. We therefore find that the capital actually employed wholly within the State by the defendant company upon which it is liable for bonus is \$86,383.45. The bonus of one-third of one per cent. upon this sum is \$287.94, and it was payable in sixty days after the settlement of November 14, 1911. It therefore bears interest from January 14, 1912. We therefore have reached the following:

#### CONCLUSIONS.

1. The settlement appealed from by the defendant company in this case is erroneous, and the defendant company is not liable for payment of the bonus charged against it therein.

2. The defendant company is liable for bonus upon its capital employed wholly within the State to the amount of, \$287.94

Interest Jan. 14, 1912, to March 12, 1915, ... 54.62

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\$342.56

Attorney General's commission 5 per cent., ... 17.13

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Total due the Commonwealth, ..... \$359.69

For this sum judgment is now directed to be entered in favor of the Commonwealth and against the defendant unless exceptions be filed within the time limited by law.

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COMMONWEALTH *v.* WILLIAMSPORT RAIL COMPANY.

*Tax on capital stock—Manufacturing corporations—Exemption.*

A corporation which does not own or operate a manufacturing plant, but merely buys raw material and pays another company for manufacturing it, is not a manufacturing company and is not entitled to the exemption from tax on its capital stock.

Appeal from settlement of tax on capital stock. C. P. Dauphin County. No. 24, Commonwealth Docket, 1913.

*Robert Snodgrass*, for defendant.

MCCARRELL, J., March 15, 1915.

The defendant company is a corporation chartered by the State of Delaware, May 8, 1910, for the purpose of manufacturing light steel rails and other steel products. It registered and began doing business in Pennsylvania November 13, 1910. Its authorized capital is \$100,000, and \$12,000 thereof was paid in cash prior to the first Monday of November, 1911. During the year ending upon that day it had no plant of its own. It purchased raw material, which was manufactured into steel rails and other products by the Sweets Steel Company for an agreed compensation, the rails and other products belonging exclusively to the defendant company, which sold the same and received the proceeds. The accounting officers have appraised the capital stock at \$13,749, and on January 10, 1913, settled a tax of \$65.87 upon this value. The defendant appealed, claiming that it was incorporated as a manufacturing company and that its capital was actually and exclusively employed in carrying on the business of manufacturing, and was therefore exempt from taxation. This is the sole question to be determined here. Trial by jury has been duly waived, and we find the facts to be as above stated.

DISCUSSION.

The purpose of our statutes relieving manufacturing com-

panies and the capital employed by them in manufacturing was to encourage the investment of capital in manufacturing plants and the carrying on of manufacturing business in Pennsylvania. The Act of June 30, 1885, P. L. 193, in express terms abolished the tax upon corporations organized exclusively for manufacturing purposes, but the courts held that this did not entirely relieve the corporations from payment of tax upon all capital stock, but only so much thereof as was exclusively employed in manufacturing enterprises. Following the decisions of our courts the later statutes have carefully restricted the exemption to so much of the corporate capital as is actually and exclusively employed in carrying on the business of manufacturing within the State. The Act of June 8, 1893, P. L. 355, imposes a tax upon the capital stock of all corporations, but stipulates that the provisions thereof "shall not apply to the taxation of so much of the capital stock of corporations, limited partnerships or joint stock associations organized for manufacturing purposes as is invested in and actually and exclusively employed in carrying on manufacturing within the State \* \* \* \* \* But every manufacturing corporation, limited partnership or joint stock association shall pay the State tax of five mills herein provided upon such proportion of its capital stock as may be invested in any property or business not strictly incident and appurtenant to its manufacturing business. \* \* \* \* \* It being the object of this proviso to relieve from State taxation only so much of the capital stock as is invested purely in the manufacturing plant and business." The corporation seeking exemption from tax upon its capital stock must bring itself clearly within the exemptions mentioned in the taxing statute. The burden is upon it to show that the necessary conditions exist entitling it to exemption. In the present case it is clearly shown by the testimony of the officers of the defendant company that no part of its capital stock is invested in a manufacturing plant, and that no part thereof is actually employed in doing the business of manufacturing. Buying raw material and sending the same to a company owning a plant, and paying that company an agreed price to shape the raw material into a manufactured product is not carrying on the business of manufacturing within the State as contemplated by our laws.

The Sweets Steel Company, which turned the raw material purchased by the defendant company into the desired manufactured product doubtless obtained exemption from tax upon so much of its capital stock as was actually invested and used in its plant and manufacturing business, and to allow a like exemption to the defendant company upon the theory that it also manufactured the product which was sold by it would be granting an exemption not contemplated by our laws. The entire capital of the defendant company was employed in the purchasing of raw material and paying another corporation for manufacturing the raw material into the rails and other product, which the defendant desired to sell. This was carrying on nothing more than a mercantile business, although the defendant company was incorporated as a manufacturing corporation. We are of opinion that the defendant company has not brought itself within any of the exceptions mentioned in the taxing statute and that it is liable to the payment of the capital stock tax as settled by the accounting officers on June 10, 1913. We have herefore reached the following:

#### CONCLUSIONS.

1. The Commonwealth is entitled to recover the capital stock tax settled against the defendant company on June 10, 1913, amounting to, ..... \$65.87

Interest June 10, 1913, to March 12, 1915, .... 6.92

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\$72.79

Attorney General's commission, 5 per cent., .. 3.64

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Total due the Commonwealth, ..... \$76.43

For which sum judgment is now directed to be entered in favor of the Commonwealth and against the defendant company unless exceptions be filed within the time limited by law.

## COMMONWEALTH v. THE POTTSVILLE WATER CO.

*Tax on capital stock—Special charter—Construction of—Act of Feb. 18, 1854, P. L. 79.*

The defendant corporation was chartered by the Act of February 18, 1854, P. L. 79, and, by the terms of that act, was exempted from payment of any tax upon its capital stock until certain sums should have been earned by the company, after which time a tax should be paid on the excess of the net annual income over and above 6 per cent. on the amount of "capital paid in." The original authorized capital was \$200,000. In 1910, the capital was increased to \$400,000. In 1912 the Commonwealth settled a tax on the amount of net income in excess of 6 per cent. on the original capital of \$200,000. The defendant contends that tax was due only on the net income in excess of 6 per cent. on the increased capital of \$400,000.

*Held:* The meaning of the words "capital paid in" is to be ascertained by reference to the other sections of the said act. These sections make it clear that the words refer to the original authorized capital of \$200,000.

Appeal from settlement of tax on net annual income. C. P. Dauphin County. No. 297, Commonwealth Docket, 1912.

*Wm. M. Hargest*, Asst. Deputy Attorney General, for Commonwealth.

*Homer Shoemaker*, for defendant.

KUNKEL, P. J., March 5, 1915.

On August 23, 1912, the accounting officers of the Commonwealth settled an account against the defendant company for tax on its net annual income for the year 1911, in which it was charged with a tax of \$11,379.75 on an excess of net income of \$45,519. On October 4, 1912, the defendant company paid on account of the tax \$4,022.28, leaving a balance unpaid of \$7,357.47.

By the Act of February 18, 1854, P. L. 79, the capital stock of the defendant was exempted from all taxation, but it was provided in Section 11 of that act: "Whenever the net annual income from the works of said company, after having repaid the boroughs of Pottsville, Port Carbon and St. Clair, whatever sums they may have respectively advanced to the said company to pay dividends with, as aforesaid, shall exceed six per cent. on the capital paid in, the said excess shall be taxable for State pur-



poses only, at the same rates as are now imposed on the dividends of banks for said purposes, and the remainder of such excess may either be divided among the stockholders, or be allowed to accumulate as a reserved or contingent fund for extraordinary repairs, or future enlargement of their works, as the said president and managers may deem best." The defendant's net income for the year in question was \$57,519. By the Act of 1854 it was authorized to receive subscriptions for eight thousand shares of stock at twenty-five dollars per share, and its paid in capital stock under that act was \$200,000. It repaid the boroughs for all the moneys advanced by them to pay dividends. After deducting a dividend of six per cent. on the \$200,000 capital stock from the net income the balance was treated by the accounting officers as the basis for the computation of the tax. The defendant company appealed from the settlement, contending that the dividend of six per cent. to be deducted from the net income of \$57,519 should be calculated on a capital stock of \$400,000, its capital stock having been increased on October 19, 1910, to that amount. The appeal has been submitted to us to be tried without a jury under an agreement as to the facts filed in the case.

The question presented is, whether or not the dividend of six per cent., which under the eleventh section of the Act of 1854 is to be deducted from the net annual income before any part of the income becomes taxable, is to be computed on the capital stock of \$200,000 or the increased capital stock of \$400,000. The controversy turns upon the meaning to be given to the words "capital paid in," as used in the section. The defendant contends that it should be interpreted to mean the capital paid in, not only under the Act of 1854, but under any subsequent legislative authority. The meaning of the words is to be ascertained by reference to the other sections of the act in which they are used. By the act the boroughs of Pottsville, Port Carbon and St. Clair, to whose inhabitants the defendant company contemplated the supply of water, were empowered to guarantee the payment of semi-annual dividends of three per cent. upon the amount of capital paid in, and to impose a tax upon the taxable property in the respective boroughs to meet any deficiency there might be in the net income of the company to pay the semi-annual dividends. In Section 9,

where provision is made to meet such a deficiency, it is declared: "If it shall appear \* \* \* \* \* that there will not be sufficient net income from the works of the said company to pay semi-annual dividends of three per cent. *on the amount of capital paid in on the subscriptions of stock hereby authorized.*" Here the capital paid in is expressly stated to be the capital paid in on the subscriptions of stock hereby authorized, that is, authorized by the act. And by the proviso in the same section, where provision is made for payment to the boroughs of the excess of income over the dividend of six per cent. on the capital stock paid in, it is provided: "That should the net annual income of the said company at any time exceed the amount of six per cent. on the capital stock paid in, such excess shall be paid over to the said town council, until the whole amount advanced by the said council as aforesaid to the said company shall have been repaid." It is clear that the "capital stock paid in," as used in this proviso, means the capital stock paid in under the subscriptions authorized by the act. If it were otherwise, the defendant company would have had it in its power to increase the capital stock so that at no time would there be any excess of income over six per cent. on its capital stock. And in the second proviso, the precaution is taken to prohibit the company to expend any money for the enlargement of its works or for any other purpose, except for keeping them in repair or for superintendence, without the consent of the borough, thus putting a limitation on any increase of the capital stock whereby the net annual income might be prevented from ever equalling the six per cent. on the capital paid in. We are satisfied that the words "capital paid in" used in Section 11 mean just what they mean in the other sections of the act, capital paid in on the subscriptions authorized by the act. This interpretation is in accord with the reasonable presumption that the Act of 1854, in the absence of anything therein to show otherwise, was enacted with reference to the then existing conditions. The parts of the act to which we have referred plainly indicate the legislative intention that the term "capital paid in" was not to cover future capital, but was to be restricted to the capital stock paid in under the subscriptions which that act authorized.

In accordance with the stipulation which the parties have filed

in the case, judgment is directed to be entered against the defendant and in favor of the Commonwealth for the sum of \$7,357.47, unless exceptions be filed within the time limited by law.

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COMMONWEALTH v. AMERICAN LIME & STONE CO.

*Bonus on increase of capital stock—Resettlement of tax on capital stock and loans—Set-off—Review of resettlement of Board of Public Accounts.*

The defendant corporation increased its capital stock in 1902 but settlement for bonus upon said increase was not made until May 7, 1913. This settlement, when made, included interest from 1902 upon the amount of bonus due. In the years 1903, 1905 and 1906 the Commonwealth overcharged, and the defendant overpaid, large amounts upon its capital stock and loan taxes, which accounts were resettled by the Board of Public Accounts on April 9, 1913. Said resettlements did not allow the defendant interest upon the amounts overpaid. The Commonwealth contends that neither the accounting officers nor the court have power to review the resettlements made by the Board so as to allow interest upon the overpayments made by the defendant.

*Held:* While no right of appeal is given from resettlements made by the Board of Public Accounts, the facts ascertained by the Board may be considered. These resettlements show the time when money became equitably due from the Commonwealth to the defendant, and the defendant is equitably entitled to set-off against the Commonwealth's claim for bonus the several overpayments so made, as of the dates when they were respectively made.

Appeal from settlement of bonus on increase of capital stock.  
C. P. Dauphin County. No. 95, Commonwealth Docket, 1913.

*Wm. M. Hargest*, Asst. Deputy Attorney General for the Commonwealth.

*John W. Jacobs*, for defendant.

MCCARRELL, J., March 6, 1915.

This is an appeal by the defendant company from a settlement for bonus on an increase of capital stock. The capital stock was increased August 1, 1902, by the addition thereto of \$1,199,000, and the bonus thereon amounted to \$3,996.67. The settlement therefor was not made until May 7, 1913. In this settlement in-

terest was charged on the bonus from September 1, 1902, to May 6, 1913. Credit was given thereon as of the date of May 27, 1913, for \$5,015.82, being amount of over-payments made by the defendant company on its capital stock and its loan taxes, and the settlement thus made shows a balance due the Commonwealth of \$1,524.80. The defendant company in its appeal contends that instead of giving credit for its over-payments on capital stock and loan taxes as of the date of May 27, 1913, credit should have been given as of the date when the several over-payments were made, and contends that if credits were thus given it would appear that all the bonus and interest legally chargeable thereon was more than paid by November 28, 1906. Trial by jury has been duly waived in accordance with the provisions of the Act of April 22, 1874. From the testimony submitted we find the following:

#### STATEMENT OF FACTS.

The defendant company increased its capital stock on August 1, 1902, by adding thereto the sum of \$1,199,000. The bonus chargeable on this increase is \$3,996.67. The settlement, however, therefor was not made by the accounting officers of the State until May 7, 1913. In this settlement interest was charged upon the amount of the bonus from September 1, 1902, to May 6, 1913. The over-payments for tax on capital stock and loans credited upon this settlement as of the date of May 27, 1913, was for over-payments made at various earlier dates as is shown by the resettlements made by the Board of Public Accounts under date of April 9, 1913. These resettlements by the Board of Public Accounts were made in pursuance of the Act of April 8, 1869, P. L. 19, which empowers the attorney general, state treasurer and auditor general "to revise any settlement made with any person or body politic by the auditor general, when it may appear from the accounts in his office, or from other information in his possession, that the same has been erroneously or illegally made, and to resettle the same according to law, and to credit or charge, as the case may be, the amount resulting from such resettlement upon the current accounts of such person or body politic."

The first settlement is for tax on capital stock for the year

ended the first Monday of November, 1902, and shows that the defendant company on August 24, 1903, paid the Commonwealth \$1,868.75, which was in excess of the capital stock tax due by the company for the year 1902, \$1,225.25.

The next resettlement is for tax on loans for the year 1902, and shows that on August 24, 1903, the defendant company paid the Commonwealth \$1,256.90, which exceeded the tax on loans for the year by \$257.40.

The next resettlement is for capital stock tax for the year ended the first Monday of November, 1903, and shows that on February 13, 1905, the defendant company paid the Commonwealth \$1,850, or \$1,173 more than was due for tax on capital stock for said year.

The next resettlement is for loan tax for the year 1903, and shows that on February 13, 1905, the defendant company paid the Commonwealth \$1,603.40, or \$158.40 in excess of the tax upon loans for that year.

The next resettlement is for tax on capital stock for the year ended the first Monday of November, 1904, and shows that on January 29, 1906, the defendant company paid the Commonwealth \$1,600, or \$948 in excess of the capital stock tax for the year 1904.

The next resettlement was for tax on loans for the year 1904, and shows that on January 29, 1906, the defendant company paid the Commonwealth \$1,583.60, or \$138.60 more than the tax on loans for the year 1904.

The next resettlement is for capital stock tax for the year ended the first Monday of November, 1905, and shows that on November 28, 1906, the defendant company paid the Commonwealth \$1,650, or \$1,010.50 more than was then due the Commonwealth for capital stock tax for the year 1905.

The next resettlement is for tax on loans for the year 1905, and shows that on November 28, 1908, the defendant company paid the Commonwealth \$1,563.80, or \$118.80 in excess of the tax on loans for the year 1905.

While these resettlements were made on April 9, 1913, they show, as above stated, the various dates upon which the over-payments were made and the dates when the Commonwealth be-

came equitably indebted to the defendant company. The defendant contends that credit should have been given for the several amounts of these overpayments as of the dates when the overpayments were made, and that it is inequitable and unjust to charge interest on the bonus from September 1, 1902, to May 27, 1913, without giving any credit for the money equitably due the company at the various dates when the several overpayments were made. This is the single question to be determined on this appeal.

#### DISCUSSION.

The capital stock of the defendant company was increased, as above stated, on August 1, 1902, and by reason of this increase the defendant company then became indebted to the Commonwealth for the amount of the bonus, to wit, \$3,996.67. The formal settlement for this bonus was not made by the accounting officers until May 7, 1913, and on April 9, 1913, nearly one month prior to the settlement of the bonus account, the several resettlements had been made by the Board of Public Accounts, as hereinbefore mentioned. The Commonwealth earnestly contends that as the Board of Public Accounts made no mention of interest accumulated upon the several overpayments made by the defendant company that the accounting officers were right in allowing credit only for the aggregate amount of the several overpayments, \$5,015.82, as of the date of the settlement of the bonus account, and suggests that this court has no power to review the several settlements made by the Board of Public Accounts, and that no right of appeal from these resettlements is given by law. We are unable to assent to this contention. While no right of appeal is given from resettlements made by the Board of Public Accounts the facts ascertained by this board in its several resettlements can certainly be considered. When these several resettlements are examined it clearly appears when the several overpayments were made and when by reason of the overpayments money became equitably due from the Commonwealth to the defendant company. From these several resettlements the fact clearly appears that by reason of the overpayments there was equitably due from the Commonwealth to the defendant com-

pany on the dates now mentioned the several amounts of money here stated, to wit :

On August 24, 1903, .....	\$1,482 65
On February 13, 1905, .....	1,331 40
On January 29, 1906, .....	1,086 60
On November 28, 1906, .....	1,129 30

If credit is given for these several amounts at the respective dates above given, as the defendant company claims should have been done, then the bonus with interest thereon from September 1, 1902, was more than paid on November 28, 1906, as will appear by Exhibit A hereto attached. The defendant company contends that it is equitably entitled to credit and set off against the Commonwealth's claim for bonus the several overpayments so made, as of the dates when they were respectively made. The accounting officers of the Commonwealth and the officers of the defendant company seem to have permitted the claim for bonus to remain unsettled for many years. The testimony of Mr. McLanahan, secretary and treasurer of the company, alleges that, "This bonus was not paid at the time of the increase wholly inadvertently. Subsequently the company learned that its capital stock and loan tax account for the year 1902 and several years subsequent were greatly overcharged in error and filed petitions for resettlement." The Act of March 30, 1811, under which the settlement for bonus was made expressly provides that all "accounts shall be examined and adjusted by the auditor general according to law and equity." At the dates of the several overpayments, as above given, the Commonwealth received into its possession money belonging to the defendant company and held it for a considerable time prior to the settlement of the bonus account. An equitable adjustment and settlement of this bonus account certainly requires that the money so received and held by the Commonwealth from the defendant company should be credited upon the bonus account as of the date when the money was so received by the State.

In *Commonwealth v. American Machine Co., 2 Dauphin Co. Rps. 27*, Judge Simonton applied this equitable principle of tax settlement and refused to permit the Commonwealth to recover

a capital stock tax upon an increase of capital for an entire year when the fact was that the increase was not made until June 5th of that year. Special reference is made to the power and duty of the auditor general at page 29 in the following language:

“But the Act of March 30, 1811, which confers upon the auditor general and state treasurer authority to settle accounts, such as the one now before us, requires them to adjust these according to law and equity; *Bank v. Commonwealth*, 10 Pa. 445-6. Equitable principles have always been applied in settling these tax accounts, and if they have been overlooked by the accounting department the error has always been corrected when the courts have been called upon to do so.”

This same equitable principle was clearly recognized by Justice Elkin in *Commonwealth v. Independence Trust Co.*, 233 Pa. 92, in which the Supreme Court refused to permit the collection a second time of a bonus upon capital stock which had been contributed by the company. The same principle was recognized in the case of *Commonwealth v. Philadelphia County*, 157 Pa. 550, and the Supreme Court prevented the collection of interest upon money not actually belonging to the city and county of Philadelphia. To compel the defendant to pay interest upon the bonus tax during the time when the Commonwealth held money which legally and equitably belonged to the defendant company appears to us to be entirely inequitable. We think the principles referred to and recognized in the cases cited should have been observed by the accounting officers in the settlement of the bonus tax. If these principles be applied to the taxes in this case, the defendant company is justly and equitably entitled to have credit upon its bonus account for the overpayments made by it on its capital stock and loans as of the dates when the overpayments were respectively made and the State had in its possession money equitably due the company. This seems to be required by the terms of the Act of April 8, 1869, P. L. 19, under which these settlements have been made, for it expressly provides that the amount of the ascertained errors shall be a “credit or charge as the case may be \* \* \* \* \* upon the current accounts of



such person or body politic." It seems to us only just and right that credit should be so given, and that the account for bonus should have been stated and settlement made in accordance with Exhibit A, hereto attached and made part hereof. When this is done, it appears that on November 28, 1906, the bonus and all interest lawfully accrued thereon had been more than paid on that date. We have reached the following:

#### CONCLUSIONS.

1. The bonus due by the defendant company upon the increase of its capital stock made August 1, 1902, was more than paid by the defendant company at the date of the settlement by the accounting officers in this case.

2. At the date of said settlement by the accounting officers there was nothing justly and equitably due the Commonwealth for bonus upon the increase of the defendant's capital stock.

We therefore direct that judgment be now entered in favor of the defendant and against the Commonwealth unless exceptions be filed within the time limited by law.

#### SCHEDULE A.

American Lime and Stone Co., to Commonwealth of Pennsylvania, Dr.:	
To bonus on, .....	\$3,996.57
Interest, Sept. 1, 1902, to Aug. 24, 1903, .....	245.80
	<hr/>
	\$4,242.47
By overpayment, Aug. 24, 1903, capital stock tax, ...	\$1,225.25
By overpayment, Aug. 24, 1903, loan tax, .....	257.40
	<hr/>
	1,482.65
	<hr/>
	\$2,759.82
Interest, Sept. 1, 1903, to Feb. 13, 1905, .....	240.10
	<hr/>
	\$2,999.92
By overpayment, Feb. 13, 1905, capital stock tax, ....	\$1,173.00
By overpayment, Feb. 13, 1905, loan tax, .....	158.40
	<hr/>
	1,331.40
	<hr/>
	\$1,668.52
Interest, Feb. 13, 1905, to Jan. 29, 1906, .....	95.94
	<hr/>
	\$1,764.46

By overpayment, Jan. 29, 1906, capital stock stock, ..	\$948.00	
By overpayment, Jan. 29, 1906, loan tax, .....	138.60	
		<hr/> 1,086.60
		<hr/> \$677.86
Interest, Jan. 29, 1906, to Nov. 28, 1906, .....		33.89
		<hr/> \$711.75
By overpayment, Nov. 28, 1905, capital stock tax, ..	\$1,010.50	
By overpayment, Nov. 28, 1905, loan tax, .....	118.80	
		<hr/> 1,129.30
Commonwealth overpaid, .....		<hr/> \$417.45

#### SUNNYSIDE CEMETERY ASSOCIATION'S CHARTER.

##### *Charter—Cemetery corporations—Corporations of the first and second class.*

Where articles of incorporation for a cemetery company presented to a Court of Common Pleas do not clearly show that the company is not to be operated for profit, but do, on the contrary, provide for a capital stock and contain an affidavit that ten per cent. of the capital has been paid in, the court will refuse a charter. Such a corporation is one of the second class and should be chartered by the Governor.

Petition for charter. C. P. Clinton County. Oct. Term, 1914.

#### PER CURIAM:

This petition is presented to us as one coming within the purposes of a corporation of the first class under the provisions of the Act of Assembly, approved July 15, 1897, § 1, P. L. 283. That Act prescribes as one of the purposes for which corporations of the first class may be incorporated, "the maintenance of a public or private cemetery." The petition in the present case and now under consideration states the purpose of the proposed corporation to be "to own and control a place and sell lots for the burial of the dead," and the notice of the application for charter published merely states it to be "to own and control a place for the burial of the dead," being silent as to the intention to sell lots. There is nothing in the articles of incorporation to show whether the moneys received from the sale of lots are to be expended ex-

clusively in the maintenance of a cemetery, or whether they are to go to the benefit of the stockholders, and in this the articles are fatally defective. If this association is designed to make a profit out of the sale of burial lots for the benefit of the stockholders it is a corporation of the second class for the purchase and sale of real estate and the application for incorporation should be made to the governor and not to the court. Prospect Hill Cemetery Co., 1 Del. County 430; West Hill Land Co., 1 Del. County 431. If, on the contrary, it is to be merely a corporation for the purpose of maintaining a public or private cemetery and all moneys received are to be devoted exclusively to that purpose, it is one which may properly be incorporated by the court, but these facts must appear clearly in the articles of incorporation and in the published notice of the intended application. That the proposed corporation is really intended to be a corporation for profit and of the second class is indicated by the fact that the articles of incorporation presented to us provide for a capital stock and an affidavit is made that ten per cent. thereof has actually been paid into the treasury, which follows a requirement of the act of assembly that applies exclusively to corporations of the second class, and has no reference to those of the first class.

A decree of incorporation is, therefore, refused.

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GEORGE B. JERYMN, ET AL., v. BARIUM PRODUCT CO.

*Insolvent corporation—Wage claim—Pending suit—Order on receiver to pay claim—Discretion of court.*

Where a claim of \$83 against an insolvent corporation for wages of manual labor, pending in court on appeal, is such that any judgment recovered thereon would be entitled to preference on distribution, and the receiver answers that he knows of no defense, the court may order payment of the claim as the measure which would best conserve the interests of the parties.

Petition of wage claimant. In the Court of Common Pleas of Lackawanna County. No. 12, October Term, 1914. In Equity.

R. W. Archbald, for Claimant.

NEWCOMB, J.—On the face of the record this claim is for the

wages of manual labor which was put in judgment shortly before the decree of insolvency. An appeal was taken and that is still pending. Yet the receiver answers that he has no knowledge of any defense and in effect submits to the action of the court. What is asked for is an order directing that the claim be paid out of the funds now in hands of the receiver. Either one of two things may be done. An order can be made as prayed for, or the cause advanced for trial and the payment allowed to take its course an final accounting. Considering the nature of the case, any judgment ultimately recovered would have to be given preference on distribution. In the meantime both parties would be at the expense of litigation; the amount to be realized by the claimant if successful would be only what was left after deducting costs incurred; and these might exhaust the whole thing. On the other hand, the corresponding expenses to the estate would amount to something. On the whole, therefore, it seems apparent that the ultimate value of the assets will be best conserved in the interest of all concerned by granting the relief asked for.

It is therefore ordered that out of the funds in his hands the receiver pay to the petitioner, Walter D. Rowland, the sum of eighty-three and sixty one-hundredths dollars (\$83.60) in full satisfaction of his claim, with leave to take credit for the same upon filing his account.

## **PUBLIC SERVICE COMMISSION.**

**PENNSYLVANIA PARAFFINE WORKS, ET AL. v. PENNSYLVANIA RAILROAD CO., AND PENNSYLVANIA COMPANY.**

*Reparation—Jurisdiction of the Commission in cases unfinished by the Railroad Commission—Act of July 26, 1913, Art. V, Sec. 5, Art. VI, Secs. 51, 54.*

Complaint was made to the Railroad Commission concerning the rates of the respondents on crude oil from Walford to Titusville, and an order or reparation was asked for. The Commission, on May 31, 1913, held the existing rate unreasonable and recommended a rate of 7½ cents per hundred pounds, but refused reparation. The new rate was not put into effect until Oct. 20, 1913. On motion before the Public Service Commission to reopen the case and award reparation it was

*Held:* (1) The powers of the Railroad Commission ceased July 1, 1913, the unfinished business of the Commission being transferred to the Public Service Commission (Act July 26, 1913, P. L. 1374, Art. VI, Secs. 51, 54).

(2) In disposing of this business the Public Service Commission is authorized to use not the powers formerly exercised by the Railroad Commission, but the powers conferred upon it by the Act of July 26, 1913, one of which is to make orders of reparation.

(3) For the purpose of disposing of the unfinished business of the former Commission the Public Service Commission enjoyed its full powers from July 26, 1913.

(4) Until the respondents changed their rates as recommended the present case was "unfinished business."

(5) Reparation should be made on shipments which moved between July 26, and Oct. 20, 1913.

Filed October 21, 1912.

No. 952.

Decided April 12, 1915.

### **Report and Order of the Commission.**

**COMMISSIONER PENNYPACKER:**

On the 30th of October, 1913, the attorney for the complainants in the above matter, made a motion to have the case reopened, for the purpose of taking further testimony therein on the question of reparation, "for the reason that many additional shipments have been made by complainants since the case was submitted and decided by the Pennsylvania State Railroad Commission, on May 31, 1913," and for the further reason that their claim for repara-

tion for prior payments is based on the fact that notice had been given that the rates charged were excessive, and that payment had been made under protest. The complaint had been filed before the Pennsylvania State Railroad Commission, and that Commission made an order May 31, 1913, recommending a rate of seven and a half cents per hundred pounds upon crude oil between Walford and Titusville, but denying reparation for past shipments. The motion to reopen the case was made before the Public Service Commission.

A hearing was held and testimony was taken March 18, 1914. From this testimony it appears that the rate of seven and a half cents per hundred pounds, recommended by the Pennsylvania State Railroad Commission was put into effect by the respondent October 20, 1913, that upon shipments made by the complainant between May 31, 1913, and October 20, 1913, the respondent had charged and been paid at the rate of eight and a half cents per hundred pounds or in excess of the rate recommended amounting to \$691.28, and between July 26, 1913, and October 20, 1913, had charged and been paid the rate of eight and a half cents per hundred pounds, or in excess of the rate recommended, amounting to the sum of \$461.61.

Counsel for the defendants filed an objection to the reopening of the case, and asked that the application be denied and the motion to reopen be overruled, upon the ground that the case had been fully heard and was *res adjudicata*, that the Railroad Commission had exhausted its authority, and that the Public Service Commission was without authority and without jurisdiction over the parties or the subject matter. This application raises squarely the rather important question as to the powers and duties of the Public Service Commission with respect to the cases transferred to it by the Railroad Commission, and the unfinished business left undisposed of by that Commission.

With respect to the matter of reparation for shipments made prior to the order of the Railroad Commission, in which order such reparation was refused, it may be contended with propriety that the matter is *res adjudicata*, but with respect to shipments subsequent to that order, for which the higher rate was charged, different questions arise.

The Act of July 26, 1913, in Section 51 of Article VI, provides that the Act of May 31, 1907, creating the Railroad Commission, and "defining their powers and duties," be repealed "to take effect the first day of July, nineteen hundred and thirteen." With the repeal of this act, all the powers created by it ceased, and the Railroad Commission came to an end. It would have been entirely within the power of the legislature to have vested the authority which had been given to the Railroad Commission in some other body, but that body, indicated nowhere any such intention. It is plain that the purpose of the Act of July 26, 1913, was to create another commission with different, enlarged and more diversified powers. That act provides for the appointment of commissioners to hold office from July 1, 1913, and then provides that "this act shall take effect the first day of January, Anno Domini, 1914, and not before except that (inter alia) . . . . . the said Commission, when appointed as aforesaid, shall have power to hear and determine any pending cases transferred to it by the Pennsylvania State Railroad Commission, and to dispose of any unfinished business of said State Railroad Commission." As to the matters contained within the exception, the act took effect upon its approval, July 26, 1913. With respect to these matters, the powers vested in the Commissioners were to be exercised from the time of their appointment. There was no power which could be exercised by them save that created by the act under which they were appointed, and nowhere does that act say or intimate that they were to exercise the lesser and different power which had been given to the previous Commission and withdrawn. They are to complete the unfinished business of the Railroad Commission, but to perform this duty with the power and authority vested in themselves.

In the case before us, the Railroad Commission made a recommendation of a lower rate. Until the rate was put into effect, the case cannot, in any proper sense, be said to have ended. Up to that time all that had been done was but preliminary to the result. At any time prior to October 20, 1913, the Railroad Commission, had it remained in existence, could have called upon the attorney general to enforce its recommendation, and had the defendants

persisted in non-compliance, would, in all probability in the performance of its duty, have taken this course. The case was, therefore, "unfinished business" within the meaning of Section 54, Article VI of the Act of July 26, 1913.

The Public Service Commission does not, however, make recommendations and call on the attorney general to enforce them. It enforces reparation where found to be due, by another method. Section 5 of Article V provides that "if after hearing upon complaint, or upon its own motion, the Commission shall determine that any rates which have been collected . . . . . after this act becomes effective by any Public Service Company complained of, were in violation of any order of the Commission, or were unjust or unreasonable or unjustly discriminatory or unduly or unreasonably preferential . . . . . the Commission shall, upon petition, have the power and authority to make an order for reparation."

As to the matter in question, the act became effective July 26, 1913. The Commission, therefore, has the power to give a hearing and direct reparation, if found to be due. The objection of the respondent to the complainant's motion to reopen the case is therefore overruled.

Upon the conclusion and recommendation of the Pennsylvania State Railroad Commission, a body vested with authority to decide upon the reasonableness of rates, this Commission finds that the rate of eight and a half cents per hundred pounds upon crude oil, between Walford and Titusville is an unreasonable rate, and that a reasonable rate is seven and a half cents per hundred pounds. With respect to the excess of charges between July 26, 1913, and October 20, 1913, amounting to \$461.61, it is the opinion of the Commission that an order of reparation ought to be made. With respect to the excess of rates between May 31, 1913, and July 26, 1913, it is the opinion of the Commission that the complainant must be left to his remedy in the Courts of Law, since the power of the Commission to give reparation only extends to rates collected "after this act becomes effective." It became effective for the unfinished business of the Pennsylvania State Railroad Commission on July 26, 1913, the date of the approval of the act.



## ORDER FOR REPARATION.

This matter having been heard by the Commission upon petition and answer filed, and the Commission having made a report thereon;

Now April 12, 1915, in conformity with said report, The Public Service Commission of the Commonwealth of Pennsylvania hereby finds and determines:

FIRST: That the rate of eight and one-half cents ( $8\frac{1}{2}$  cents) per one hundred pounds upon crude oil shipped over the lines of the respondents between Walford and Titusville, Pennsylvania, between July 26, 1913, and October 20, 1913, was found by the Pennsylvania State Railroad Commission to be an unreasonable rate, and that the rate of seven and one-half cents ( $7\frac{1}{2}$  cents) per one hundred was the reasonable rate for said transportation.

SECOND: That between July 26, 1913, and October 20, 1913, the complainants, the Pennsylvania Paraffine Works and the Bessemer Refining Company, shipped over the lines of the respondents between Walford and Titusville four million, six hundred and sixteen thousand one hundred and twenty-one (4,616,121) pounds of crude oil, and that notwithstanding the finding aforesaid, the said Pennsylvania Paraffine Works and Bessemer Refining Company were charged by and paid to the respondents for said shipments at the rate of eight and one-half cents ( $8\frac{1}{2}$  cents) per one hundred pounds, whereas the rate charged and paid should have been seven and one-half cents ( $7\frac{1}{2}$  cents) per one hundred pounds, in accordance with said finding.

THIRD: That the complainants, the Pennsylvania Paraffine Works and the Bessemer Refining Company are therefore entitled to reparation from the respondents on shipments made between July 26, 1913, and October 20, 1913, at the rate of one cent (1 cent.) per one hundred pounds on four million six hundred sixteen thousand one hundred twenty-one (4,616,121) pounds of crude oil shipped.

Therefore The Public Service Commission of the Commonwealth of Pennsylvania directs the Pennsylvania Railroad Company and the Pennsylvania Company on or before May 6, 1915, to pay to the Pennsylvania Paraffine Works and the Bessemer Re-

fining Company the amount of four hundred sixty-one dollars and sixty-one cents (\$461.61), the reparation found to be due.

*In witness whereof* the said Commission has caused these presents to be signed by its chairman, and its seal to be hereunto affixed, duly attested by its secretary the day and year above written.

SAMUEL W. PENNYPACKER, *chairman*.

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BONDHOLDERS OF THE ALLEGHENY VALLEY WATER CO. v. BOROUGH OF TARENTUM.

*Erection of municipal water plant—Construction begun prior to July 26, 1913—Competition—Injunction—Powers of the Commission.*

The respondent, the Borough of Tarentum, by ordinance of April 27, 1908, ordered an election upon an increase of indebtedness for the purpose of constructing a municipal water plant. The complainants filed a bill in equity to restrain the borough, which bill was dismissed by the court, the decree affirmed by the Supreme Court, and appeal therefrom refused by the Supreme Court of the United States. Respondent, after approval of the said loan, sold its bonds, secured a permit from the Board of Health, and proceeded to construct its plant, which plant was "by authority of law in process of construction" prior to the approval of the Public Service Company Law. The plaintiffs now ask the Commission to enjoin the operation of the respondent's plant.

*Held:* The Commission has no power under the Act of July 26, 1913, to enjoin the respondent, and any proceeding brought by the Commission or the attorney general in the Court of Common Pleas under Art. VI, Secs. 33 and 34, would be fruitless in view of the prior hearing and disposal of the matter by the courts. The complaint should be dismissed.

COMPLAINT DOCKET NO. 191.

Filed April 23, 1914. Submitted Sept. 1, 1914. Decided April 9, 1915.

Report and Order of the Commission.

COMMISSIONER PENNYPACKER:

The petition sets forth in substance that the petitioners are bondholders and representatives of other bondholders of the Al-

Allegheny Valley Water Company; that the bonded debt of this company is five hundred thousand dollars (\$500,000.00); that the Allegheny Valley Water Company is the successor by purchase of the property and franchise of the Tarentum Water Company which has for years past been supplying water to the inhabitants of the Borough of Tarentum;

"that the officials of the Borough of Tarentum are now and have been for some time past engaged in the construction of a water plant and are threatening to furnish water at unreasonably and ruinously low rates for the purpose of injuring, destroying and bankrupting the said Allegheny Valley Water Company \* \* \* that your petitioners are informed and believe that said officials have not complied with the Public Service Law in that they have not obtained the requisite consent, nor filed the required schedule of rates; that they are also informed and believe that the water the said officials of Tarentum propose to furnish to its inhabitants is neither pure nor healthful."

The prayer of the petition is that the Commission

"restrain and enjoin said Tarentum Borough and its officials from further continuing to construct said plant" and that "they may be restrained and enjoined from so using said proposed plant as to unreasonably and unfairly depress rates, thereby injuring and destroying the security of the bondholders."

The answer of the Borough of Tarentum sets up that for a long time prior to September 13, 1907, the Tarentum Water Company

"furnished at excessive rates an insufficient supply of water, which water was impure and for long periods of time unfit to use, whereby much sickness was caused;"

that September 13, 1907, the borough filed a bill in equity to compel the company to furnish an adequate supply of pure water; that an ordinance of the borough, April 27, 1908, signified its desire to increase the indebtedness of the borough in the sum of one hundred thousand dollars (\$100,000.00) for the purpose of constructing municipal water works and ordered an election at which the electors gave their assent; that the Tarentum Water Company and the Allegheny Valley Water Company, June 17, 1908, filed a bill in equity to restrain the borough from constructing the plant,

which bill the court dismissed; that the Supreme Court affirmed the decree of the court below, and the Supreme Court of the United States refused an appeal; that the borough by ordinance, August 5, 1911, authorized an increase of the indebtedness in the sum of one hundred thousand dollars (\$100,000.00) for the purpose of constructing municipal water works, and sold bonds to that amount; and

“under authority of a permit secured from the Board of Health of the Commonwealth of Pennsylvania has completed its municipal plant and is now prepared to furnish a sufficient supply of pure water;”

that the Allegheny Valley Water Company

“has never furnished an adequate supply of pure water”; and that the borough

“by authority of Law had in process of construction its said municipal water plant for the rendering and furnishing of water to its citizens prior to the passage and approval of the Public Service Company Law of July 26, 1913, P. L. 1374.”

The answer denies that the borough threatens to furnish water at unreasonably and ruinously low rates, and that it is attempting to destroy the security of the petitioning bondholders.

Whatever may be the conclusion reached in this case the determination of the questions raised involves great hardship.

The Allegheny Valley Water Company has an established plant and has with its predecessor, the Tarentum Water Company, for many years been supplying the Borough of Tarentum with water. It has issued bonds secured upon its plant to the amount of five hundred thousand dollars (\$500,000.00). No matter what may have been the purpose of the borough the effect of the erection of a water plant by it will be to lessen the value of these securities. It appears from the evidence taken that much the larger number of the persons supplied with water by the Allegheny Valley Water Company are inhabitants of Tarentum. On the other hand the borough has completed a water plant and has issued bonds for the purpose to the amount of one hundred thousand dollars (\$100,000.00). To prevent the operation of this plant would also have the effect of destroying property and lessening

the value of securities. The Commission is unable to see any way by which the relief prayed for in the petition can be granted. The evidence fails to show that the water supplied and to be supplied by the respondent is impure as alleged. Both plants draw their water from the Allegheny river. In that river above both of them there are discharges of sewerages. Both depend for purification upon filter plants. The system adopted by the borough has had the approval of the State Board of Health.

The evidence also fails to present anything which would enable the Commission to find that the rates established, or to be established by the respondent are "unreasonably and ruinously low."

It appears from the testimony of Leo Hudson, the Borough Engineer, which was not contradicted, that the filter plant of the borough was completed and the water turned into the system April 19, 1914. The petition in this case was filed April 23, 1914, four days afterwards. The proceedings were therefore begun too late to enable the Commission to enjoin the construction of the plant as prayed for even if it should have the power.

Should the Commission undertake to enjoin the operation of the plant it would again meet with insuperable difficulties. The Act of July 26, 1913, gives the Commission no power to issue injunctions. Sections 33 and 34 [Art. VI] provide that the attorney general shall on request of the Commission proceed by injunction or that the Counsel of the Commission may institute proceedings in the Court of Common Pleas of Dauphin County, to restrain violations of the orders of the Commission. It is assumed that this is the authority which the petitioners intended to invoke. If steps were taken under this section it would be a proceeding in a court of equity. That court would probably at once decline to destroy the property of the borough in its plant, would declare that the petitioners had been guilty of laches in permitting the borough to expend its moneys without interference until after the completion of the plant, and would leave the petitioners to their action for damages at law. The petitioners would also be confronted with the fact that the Allegheny Valley Water Company had already endeavored to have the construction of the plant restrained by a court of equity; had carried the matter to the highest court and that the case had been decided adversely to its interest.

It is the opinion of the Commission that the petition will have to be dismissed.

ORDER.

This case being at issue on complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters involved having been had, and the Commission having on the date hereof made and filed of record its report, which report is hereby referred to and made a part hereof.

Now, to wit, April 9, 1915, *It is ordered:* That the prayer of the complaint in this case be and the same hereby is refused and the petition dismissed.

By the Commission,  
SAMUEL W. PENNYPACKER, *Chairman.*

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MANSFIELD STATE NORMAL SCHOOL *v.* MANSFIELD WATER CO.

*Water rates—Flat rate—Reasonableness of.*

Complainant alleges that the increase of the flat rate paid by it to the respondent from \$800 to \$1,200 per year is unreasonable. The evidence showed that the water company did not furnish a meter for measurement of the water consumed and that the estimates of the complainant and respondent differed.

*Held:* The respondent should install a meter and charge complainant according to its rates duly filed and posted according to law.

COMPLAINT DOCKET No. 332.

Filed December 15, 1914.

Decided April 9, 1915.

Report and Order of the Commission.

COMMISSIONER WRIGHT:

The Mansfield State Normal School of Mansfield, Tioga County, Pa., alleges that the rates charged said complainant by the Mansfield Water Company are excessive, unjust and unreasonable. The complainant in this case is one of the Normal Schools of the Commonwealth of Pennsylvania.

Mansfield contains a population of about 1,700, and its water for domestic and other purposes is supplied by respondent com-

pany, incorporated in September, 1891, since which time it has furnished not only the town but the school, the complainant in this case. The complainant paid a "flat rate" of \$800.00 per annum for water used until January 1, 1915, when the rate was increased to \$1,200.00 per annum, and it is on account of this increase that the complaint was brought against respondent company, no change having been made in water rates to other patrons of the town of Mansfield.

The Mansfield Water Company has a combined system of pumping and gravity; it being necessary to pump part of the supply of water for about one-half of each year.

A hearing was held upon the above complaint before the Public Service Commission at Harrisburg, Tuesday, February 16, 1915. The record of the evidence at said hearing showing that the Water Company rates, as posted and filed, make a rate to complainant of \$100.00 per month, entitling the school to use 400,000 gallons and excess at 20 cents per 1,000 gallons, but the Water Company furnishes no means whereby the consumption can be measured and testimony was presented alleging that the school was paying for more water than it consumed.

The respondent company presented estimates showing that based on rates charged residents of Mansfield the school would be compelled to pay considerably more than \$1,200.00 per year. It was shown by testimony that the Water Company has never paid a dividend, and total revenues for past five years amounted to \$31,601.73. During the same period the disbursements for interest on bonds and notes, operating expenses and taxes amounted to \$31,434.50 leaving a net revenue of only \$117.25 for five years period, 1910, to 1914 inclusive, not allowing for depreciation. The salaries of officers were shown to be nominal except the superintendent, who received a salary of \$500.00 per annum.

It was further shown that one of the main contentions in this case arises from the absence of any proper means of measuring the amount of water used by the school. It appears to the Commission that by the installation of a meter to properly register the consumption, the matters in dispute will be adjusted upon a satisfactory and equitable basis and the rate charged the school by the Water Company should be based upon the consumption of water

as shown by the reading of the meter, which, when so installed, will automatically determine whether the charge of \$1,200.00 per annum is excessive, based on the rate as published and posted.

An order will issue.

#### ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

*Now, to-wit, April 9, 1915, It is ordered:* That the Mansfield Water Company forthwith install a meter to measure all water supplied to the premises of the Mansfield State Normal School, and that the complaint be and the same is hereby dismissed.

By the Commission,  
SAMUEL W. PENNYPACKER, *Chairman.*

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#### BUSINESS MEN'S ASS'N OF HATBORO *v.* THE PHILA. & READING Ry. Co.

##### *Train service—Agreement to operate a train "permanently."*

Complainant alleged (1) that the withdrawal of a certain train between Glenside and New Hope, Pa., by the respondent, was in violation of an agreement between complainant and respondent made at the time when a similar complaint was withdrawn from the State Railroad Commission, and (2) that the accommodation of the public demanded the operation of such a train.

*Held:* (1) The meaning of the word "permanent" in the agreement between the parties, is "not temporary." It does not mean "lasting or existing forever." The withdrawal of the train after four years of trial is not a violation of the agreement.

(2) As the train was operated at a loss and as its patrons have other means of transportation at the hour at which it was operated, the train may be discontinued.



## COMPLAINT DOCKET No. 329.

Filed December 12, 1914.

Decided March 17, 1915.

COMMISSIONER WALLACE:

The Borough of Hatboro is located on the line of the Northeastern Pennsylvania Railroad, a distance of 6.7 miles north of Glenside and 18.6 miles from the Reading Terminal in the City of Philadelphia. This railroad runs from Glenside to New Hope, a distance of 25.7 miles, connecting at Glenside with the main lines of the Philadelphia and Reading Railway, and is under the sole and exclusive control and management of the Philadelphia and Reading Railway Company, the respondent in this case.

For ten years, from May, 1894, to November, 1904, the respondent operated a passenger train from Philadelphia to New Hope, leaving Philadelphia at about eleven o'clock at night. This train was for the accommodation of the people residing along the line of the Railway Company who desired to attend the theatre and other places of amusement in the City of Philadelphia, and was withdrawn from the schedule on November 26, 1904. In April, 1912, eight years after the withdrawal of the so-called "theatre" train, a petition was filed with the Pennsylvania State Railroad Commission praying that the respondent be recommended to operate daily a passenger train from Philadelphia to points on the Northeastern Pennsylvania Railroad, leaving the Philadelphia Terminal at about 11 P. M. The hearing on this petition was held and testimony taken before the Railroad Commission on May 1, 1912, but, before any determination or finding was made by that Commission, the complaint was withdrawn under an agreement between the parties with respect to the restoration of this midnight train and certain other service on the line. From May 26, 1912, to November 21, 1914, the respondent railway company operated a passenger train daily, except Sunday, leaving the Terminal in Philadelphia at 11:25 p. m. and running to Ivyland, a station about 2.9 miles north of Hatboro.

The complainant now asks that this midnight train be restored to the schedule of the Railway Company, alleging—

(1) That its withdrawal by the respondent company is in vio-

lation of the agreement made at the time the complaint before the Railroad Commission was withdrawn;

(2) That said train was well patronized and is necessary for the accommodation and convenience of the people of Hatboro.

In answer the respondent denies that the discontinuance of the said train is a violation of said agreement and that the said train was well patronized, and also alleges that the train was withdrawn solely because the revenue received was not sufficient to justify its operation.

The questions at issue in this case are:

First—Was the withdrawal of this “theatre” train a violation of the aforesaid agreement?

Second—Is the public demand for this train sufficient to require the company to incur the expense of its operation?

With regard to the first question, the testimony shows that the agreement is in the nature of correspondence between Mr. Kinter, counsel for the railway company, and Mr. Garner, counsel for the complainants. This correspondence we have carefully considered and are of the opinion that these letters cannot be interpreted as binding the railway company to run this train as long as the road is in operation and passenger service of any kind furnished by it. To hold differently would require us to give the word “permanent” a meaning at variance with its accepted legal definition, to-wit, “not temporary.” It was decided in *Texas, etc., Railroad Company v. Marshall*, 136 U. S. 393, 34 L. Ed. 385, that “permanent” does not mean forever, or lasting forever, or existing forever; and in *Soule v. Soule*, 87 Pac. 205, that “permanent” is not the equivalent of perpetual, or unending, or life-long, or unchangeable. In fact, we are unable to find any decision, nor has any been called to our attention, which gives to the word “permanent” a meaning such as is claimed by the complainant in this case, namely, to continue forever. The correspondence which forms the basis of the agreement is between attorneys well versed in the law and it is proper to assume that they were well acquainted with the accepted legal definition of “permanent,” and the complainant cannot now claim that a different meaning should be applied.

As to the second question, the testimony of the complainant was

to the effect that the average number of inhabitants of the Borough of Hatboro who used this train was from eight to twelve daily, the witnesses testifying that they personally used it on the average of once a week. No testimony was offered to show that any additional number of persons would take advantage of this train if it were restored to the schedule.

On behalf of the respondent it was testified that in the fall of 1912, just before the train was withdrawn, count was kept for five days of the number of persons using this train, which count showed an average of 14 persons daily between Glenside and Ivyland. It was further testified that the operating expense of this train is \$11.05 daily, including only wages and fuel, or a cost of 51 cents per mile for operation. The respondent also offered in evidence a statement showing the income for the years 1910 to 1914, inclusive, on the Northeastern Pennsylvania Railroad line, which statement shows a loss of about \$6,000 in 1910, increasing to almost \$60,000 in 1914; also a statement showing the operating expenses. The evidence shows that the average income received daily on this so-called "theatre" train was 20 cents per mile, as over against an operating expense of 51 cents per mile. It was also established by competent testimony that this midnight train must return to the Reading Terminal deadhead, and the cost of the operation of the train both to and from Hatboro must, therefore, be considered. It was further shown that it would be impossible to so operate the train that the return trip would be rendered unnecessary.

The testimony also shows that the people of Hatboro have two ways of returning from Philadelphia other than by train: first, by train to a station at Noble on the main line of the Philadelphia and Reading Railway, and thence by trolley to Hatboro; and second, directly by trolley from Philadelphia, through Willow Grove, to Hatboro. The schedule of the trolley line affords ample opportunity for the people of Hatboro to return from Philadelphia at any hour up to midnight.

Under all the testimony in the case, the Commission is of the opinion that the complainant has not shown sufficient public demand for this midnight train to warrant this Commission's requiring the Railway Company to restore said train and operate

same at a loss, and, therefore, an order will be entered dismissing the complaint.

ORDER.

This case being at issue, on complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof :

*Now, to-wit, March 17, 1915, It is ordered:* That the complaint in this proceeding be and the same is hereby dismissed.

By the Commission,

SAMUEL W. PENNYPACKER, *Chairman.*

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W. H. ENCK *v.* THE READING AND COLUMBIA R. R. Co., AND  
THE PHILADELPHIA AND READING RY. Co.

COMPLAINT DOCKET No. 324.

Submitted December 7, 1914.

Decided February 16, 1915.

*Station facilities.*

REPORT AND ORDER OF THE COMMISSION.

And *now*, February 16, 1915, it appearing that the station complained of has been in existence for upwards of twenty-two years; that the objections are due, to some extent, to pipes emitting steam, obstructions, and to building operations interfering with access, which are temporary and which the respondent undertakes to have corrected; that the respondent has prepared plans for a new station which may be erected in the future, and that financial conditions are at the present time unfavorable;

*It is ordered,* That the prayer of the petition be not granted and the petition be dismissed without prejudice to the right of the complainant to renew the application at some future time.

By the Commission,

SAMUEL W. PENNYPACKER, *Chairman.*

**ALEXANDER GUY v. THE NEW YORK CENTRAL RAILROAD CO.****COMPLAINT DOCKET No. 343.****Filed February 1, 1915.****Decided March 17, 1915.***Train service between Blossburg and Morris Run.***REPORT AND ORDER OF THE COMMISSION.****COMMISSIONER GAITHER:**

In this case Alexander Guy complains against the respondent company that two coaches as part of a funeral train operated between Blossburg and Morris Run, Tioga County, on November 12, 1914, were not properly heated, and that the passenger service given by the company between these points is inadequate. It was also brought out at the hearing that the railroad company had upon one occasion backed a "funeral train" down the steep grade from Morris Run to Blossburg, making travel dangerous, and while this was not contained in the complainant's original charge against the company the Commission took this subject into consideration, it being a matter concerning the safety of the public. It was satisfactorily explained that this was not a practice, but upon the one occasion mentioned a conductor not familiar with the rules, this having been his first trip, was in charge of the train.

The records of the Public Service Commission show that upon December 15, 1913, the complainant with others, filed almost similar charges against the railroad company; also under date of February 5, 1914, the company filed with this Commission a written communication agreeing to install proper heating apparatus and properly maintain the same.

It was not contended in this respect that there was a general violation of this agreement, but only in the instance of a certain train operated on the date specified above.

Morris Run is a village 3.6 miles northeast of Blossburg. Its existence depends entirely upon coal mining interests and the small passenger traffic is contingent upon the operation of the coal trains; especially so as one train crew is employed for both. As a result there is but one passenger train each way daily with a schedule that does not conflict with the freight service.

Were it not for the fact that respondent company has an agreement with the Erie Railroad to carry this coal output to Lawrenceville, approximately 29 miles, the same train crew could easily be utilized for additional passenger service between Morris Run and Blossburg, but under present conditions the installation of another train would also require the employment of a second crew, and taking everything into consideration this would seem unjust to the company.

The fluctuating demand for coal and the resultant irregular operation of the coal trains would make it impossible for the company to carry coaches on these trains, and the complainants claim for more efficient train facilities cannot be sustained.

#### ORDER.

This matter being before The Public Service Commission of the Commonwealth of Pennsylvania, upon complaint and answer on file, and it appearing to the Commission that no reasonable ground exists for investigating said complaint:

*Now, to-wit, March 17, 1915, It is ordered:* That the complaint in this matter be and the same hereby is dismissed.

By the Commission,

SAMUEL W. PENNYPACKER, *Chairman*.

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#### PITTSBURGH PLATE GLASS CO. v. PENNA. R. R. CO.

#### *Demurrage—Private cars standing on private sidings—Scope of general demurrage rules.*

Where private cars are exclusively used for hauling the owner's coal from its own mine to its own plant demurrage may not, in the absence of any agreement which expressly or impliedly puts the cars in the service of the carrier, be charged while the said cars stand loaded upon the owner's own tracks. Such a case is not within the scope of the language of the existing general demurrage rules.

Demurrage is a charge in the nature of a penalty for the unreasonable detention of cars which belong to the carrier or are in the service of the carrier under the terms of an agreement with the owner, either express or implied, and its purpose is to secure the prompt return of the cars.

## COMPLAINT DOCKET No. 227.

## Report and Order of the Commission.

Filed June 10, 1914.

Decided April 6, 1915.

## COMMISSIONER TONE :

The complainant is the owner of a plate glass factory at Tarentum in Allegheny County, Pennsylvania. It owns also a coal mine three-quarters of a mile away, from which it ships the coal needed in the factory, on the line of the respondent railroad. It owns also a number of steel hopper cars in which the coal is shipped and which are used exclusively for this purpose. The respondent charges the regular tariff rates for the transportation, making allowance to the complainant of six-tenths of a cent per mile for each car. The respondent seeks to charge demurrage for these cars at the rate of one dollar per car per day while they, after delivery, stand loaded upon the tracks of the complainant constructed by it upon its own property. It is this charge of demurrage to which the complainant objects. The general railroad rules respecting demurrage, which have met the approval of the Interstate Commerce Commission provide as follows :

"Private cars while in railroad service, whether on railroad company or private tracks, are subject to these demurrage rules, to the same extent as cars of railroad ownership. Empty private cars are in railroad service from the time they are placed by the railroad company for loading or tendered for loading on the orders of the shipper. Private cars under lading are in railroad service until the lading is removed and cars are regularly released."

This is a case which ought to be decided upon its own facts, and these facts distinguish it from most, if not all others which have been heretofore determined. It is contended for the respondent first, that the case of the complainant is within the language of the above cited rules ; and second, that certain authorities which were cited have determined the question here raised upon principle in favor of the respondent. A brief review of these authorities, therefore, becomes necessary.

After the adoption of the demurrage rules, Thomas Carlin's

Sons Company filed a complaint against the Baltimore & Ohio Railroad Company before the Pennsylvania State Railroad Commission and that Commission decided, April 13, 1911, that—

“The Commission is of the opinion that when the private car has been returned to your plant and placed upon your exclusively owned track it is not subject to demurrage charge.” [1911 Pa. R. R. Com. Rep. 37.]

In a case of 13 I. C. C. Rep. 378 *In Re Demurrage Charges on Privately Owned Tank Cars*, it was held—

“That private cars owned by shippers and hired to carriers upon a mileage basis are subject to demurrage when such cars stand on the tracks of the carrier either at point of origin or destination of the shipment, and are not so subject when either upon the private track of the owner of the car or the private track of the consignee.”

In a later case, that of *Proctor & Gamble Company v. Railway Company*, 19 I. C. C. Rep. 556, the complainant owned, maintained and operated private tracks located on its own land for use in and for the purpose of switching cars between interchange tracks connected with lines of the defendant and the various loading and unloading places within the plant.

The complainant owned tank cars which the Commission found were—

“used by defendants under a tariff which provides among other things that when tank cars are furnished by shippers or owners, mileage at the rate of three-fourths of a cent per mile will be allowed by the defendant for the use of such tank cars loaded or empty.”

The Commission sustained the demurrage rule and held that the defendants were entitled to demurrage while the privately owned cars stood on the privately owned tracks. The complainant filed a petition with the Commerce Court asking that the order of the Interstate Commerce Commission be annulled, which petition was dismissed, and on appeal to the Supreme Court of the United States it was held that the Commerce Court had no jurisdiction in the matter. The order of the Interstate Commerce Commission, therefore, remained in effect. The principles upon which the Commission based its order were in brief, that under



the law the defendants were under no obligation to haul complainant's private cars, and that their use by the defendants, under the terms of the tariff, constituted an arrangement to which both parties assented, and one of the terms of which provided for demurrage in the situation stated.

It will be observed that these principles cannot apply to the case now to be decided for the reason that under its charter the Pennsylvania Railroad Company is under obligations to transport private cars, and further that it could not possibly be here found that the cars were in the service of the railroad company impliedly or otherwise since they were exclusively used by the complainants for hauling its own coal from its own mine to its own plant and that all the railroad furnished was this transportation.

The contention of the complainant which the Commission rejected in the Proctor & Gamble Company case was :

"That a privately owned car while standing upon a privately owned track should be free from demurrage even though the car was owned by one private interest and the track by another private interest."

In the case of the General Elec. Co. v. N. Y. Central Ry. Co. decided by the Public Service Commission of New York in 1910, it was held that :

"The part of the demurrage code here objected to by complainant, so far as it relates to private cars inbound under load to the industrial company owning the cars after removal of the cars from the interchange or delivery track, must be held unreasonable and without warrant of law."

To some extent, however, the defendant relied upon the case of Penna. R. R. Co. v. Waverly Oil Works Co. recently decided by the Superior Court of Pennsylvania [58 Super. 154]. The railroad sued for demurrage on ten loaded cars delivered on the siding of the defendant. The affidavit of defense set up that the cars were not the property of the plaintiff or any other common carrier but were the cars of private companies engaged in private enterprises and that they were detained by the defendant on its own private siding. Judgment was entered for the plaintiff and it is entirely clear that the affidavit set up no defense and that no other conclusion was possible. The sole and complete allegation

of the defendant was that the plaintiff did not own the cars. It was in no way required to own them. It might have leased or borrowed or in some other way arranged with the owner for their use. It was no concern of the defendant whether or not the plaintiff owned the cars and the court points out:

"The cars did not belong to the defendant and it has no standing to inquire what were the circumstances under which the plaintiff obtained possession of them from the owner."

This decision has little or no bearing upon the case before us in which the complainant owns the cars and the existence of any such possible agreement is denied.

Demurrage is a charge in the nature of a penalty for the unreasonable detention of cars which belong to the carrier or are in the service of the carrier under the terms of an agreement with the owner, either expressed or implied, and its purpose is to secure the prompt return of the cars. Under the facts of the present case the cars were not in the service of the carrier. They could not be used by the carrier for any other purpose than the service of the complainant. At the time the demurrage was attempted to be imposed these cars had been delivered to the complainant and its own cars filled with its own commodities stood upon its own tracks. The railroad denies any liability for the cars or lading after delivery upon the owner's siding. Under these circumstances the reason for the enforcement of demurrage seems entirely to fail. Its enforcement could not compel the prompt return of the cars. The defendant had no right of any kind to the cars or their use or possession. The complainant after unloading, might retain the cars and never return them. No right to possession upon the part of the railroad could be in any way maintained. If the complainant should choose to keep his goods in his cars awaiting a rise in the market or for some other reason, what ground could there be for the contention that they were in the service of the carrier? The argument that the carrier ought to be enabled to know upon how many private cars it may depend in order that it may secure sufficient other cars for its service, fails in this situation because these cars could never have been depended upon for such service and the carrier could not have been misled. The contention that an advantage is given

to the owners of private cars if demurrage be not charged, and that the result therefore is discrimination, also fails. There are certain advantages which follow from the ownership of capital, which cannot be counteracted. The man who lays a switch has an advantage over one who depends upon carts. The man who buys a car pays less freight than others. This argument, if sound, could properly be extended to the ownership of the cars, to which the avoidance of demurrage is only an incident.

The language of the general demurrage rules does not specifically refer to the case of the delivery of cars to their owner upon his own tracks. The language is:

"Empty private cars are in railroad service from the time they are placed by the railroad company for loading or tendered for loading on the orders of the shipper. Private cars under loading are in railroad service until the lading is removed and cars are regularly released."

It gives sufficient scope to this language to hold that it applies to the usual case of private cars in the service of the carrier and delivered to consignor or consignee but that it does not go so far as to cover the case of delivery to the owner upon his own tracks in the absence of any agreement which expressly or impliedly puts the cars in the service of the carrier. We express no opinion as to the reasonableness of the existing general demurrage rules, but consider that the present case is not within them, and is to be determined on its own merits. If these rules had provided that private cars, not only when on private tracks but when on private tracks belonging to the owner, should be subject to demurrage, the question of the reasonableness of the rules would have arisen.

For the reasons given, the prayer of the petition of the complainant is granted, and his application is sustained.

#### **ORDER.**

This matter being at issue upon complaint and answer on file and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions

thereon, which said report is hereby referred to and made a part hereof :

*Now, to wit, April 6, 1915, It is ordered, That the Pennsylvania Railroad Company cease and desist from charging and collecting from the Pittsburgh Plate Glass Company demurrage upon the loaded coal cars of said glass company transported by said railroad company from the mines of the glass company at Creighton and placed upon the private siding of said glass company at its factory at West Tarentum, Pa.*

By the Commission,  
SAMUEL W. PENNYPACKER, *Chairman.*

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APPLICATION OF READING, BIRDSBORO & POTTSTOWN R. R. Co.

*Trolley companies—Extensions—Approval of—Lack of evidence to show public necessity—Discretion of the Commission.*

The extension of a trolley line will not be approved in the absence of sufficient data showing the population to be served and the traffic to be secured. In the exercise of its discretion the Commission will consider the population and the industries to be served, and the likelihood of a reasonable return upon the investment to be made. The fact that individuals are willing to risk their money in the enterprise is not sufficient to justify approval of it.

APPLICATION DOCKET No. 338, 1914.

Report and Order of the Commission.

Filed December 14, 1914.

Decided April 10, 1915.

COMMISSIONER WRIGHT:

The Reading, Birdsboro and Pottstown Railroad Company was incorporated in the year 1901 under the Acts of 1868 and 1875. Since its incorporation it has done little except pay its taxes to the Commonwealth and make repeated and unsuccessful attempts to obtain from the City of Reading a franchise granting permission to enter that city.

This corporation filed its supplementary articles of association with the Secretary of the Commonwealth after having passed a resolution for the purpose of extending its lines from the village

of Gibraltar via Birdsboro and Amityville to the village of Stowe, a distance of about 14 miles. The original charter covered a distance of about five miles from the City of Reading to the village of Gibraltar. The company then applied to the Public Service Commission for a Certificate of Public Convenience, and a hearing was held on Dec. 16, 1914, but as no financial statement was filed, as required by the Rules of the Commission, the applicant was, at its own request, granted time to file a supplemental petition, on which a hearing was held on Jan. 20, 1915, and continued on Feb. 3, 1915, the Reading Transit and Light Company appearing as protestant. Several witnesses were sworn. The testimony at this hearing was not definite, either as to the density of the population of the district through which the extension was to be made, or as to the needs of the territory, neither was there any definite evidence produced showing that there was any prospective traffic which would warrant the investment of building the road. the reason

The evidence was so conflicting that it is hard to form any definite opinion as to the population to be served, but it appears to be clear, that aside from the towns of Gibraltar, Birdsboro and Stowe and the contiguous territory, which are now well supplied with railroad facilities, there would be only Amityville and a few small villages, which collectively would not exceed from 1,000 to 2,000 inhabitants, and these towns would not in our opinion furnish sufficient traffic to warrant the building of the road nor would the revenue of said road, if built, be sufficient to warrant the investment in its building.

One witness testified that he could not give an estimate as to business on the road if built; that he estimated about 10,000 population between Birdsboro and Stowe. Another witness testified the population was about 1,600.

There are three lines of railroad and one trolley road now serving the towns of Birdsboro and Gibraltar. Stowe, which is one terminus of the proposed extension, has two lines of railroad. The applicant did not show by any witness the volume of shipments in or out on either of the lines of the railroads now serving these towns, nor was any evidence produced to show accurately the prospective amount of farm products or other freights shown

by an actual canvass of the territory which said extension would serve, nor any accurate data showing the population of said communities and whether sufficient to warrant the building of the road. On the other hand, the larger towns and considerable of the surrounding territory are now being well served by three railroads and one trolley.

The fact that individuals are willing to put in their money and solicit the money of others to construct the extension is not enough to justify a finding that the proposed construction is necessary or proper for the safety, accommodation, convenience or service of the public. Nor is the approval to be granted because certain persons in the localities to be served desire the construction.

The question of public requirements should be determined by taking into consideration the population and industries to be served, the adequacy of existing facilities, the likelihood that the proposed construction will be able to earn a reasonable return on the investment required to build it, and the desirability of permitting an investment in a public service enterprise which is not shown to be necessary. The Commission must consider all these matters in exercising the discretion vested in it.

The Commission is of the opinion that the applicant failed to show public necessity for the approval of the amendment to its charter authorizing the building of the proposed extension and that the application should be refused.

An order will be so drawn.

#### ORDER.

This case being at issue, upon petition and protests on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

*Now, to wit, April 10, 1915, It is ordered, That the petition be and the same hereby is dismissed and the application refused.*

By the Commission,

SAMUEL W. PENNYPACKER, *Chairman.*

CHARLES S. KEEFER v. THE PENNSYLVANIA RAILROAD COMPANY.  
COMPLAINT DOCKET NO. 316.

*Petition for rehearing—*

ORDER.

This matter being before the Commission on petition of the Pennsylvania Railroad Company for a re-hearing:

Now, to-wit, March 17, 1915, *It is ordered:* That the said petition for re-hearing be and the same is hereby refused, and the report and order of the Public Service Commission of the Commonwealth of Pennsylvania made and entered on February 17, 1915, in this complaint be and the same is hereby affirmed.

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BOROUGH OF EXETER'S PETITION.

MUNICIPAL CONTRACT DOCKET No. 34, 1914.

*Modification of finding, determination and order refused.*

ORDER.

This matter being before The Public Service Commission of the Commonwealth of Pennsylvania on petitions of the Consumers Electric Company of the Borough of Exeter and of the Borough of Exeter for a re-hearing and for a modification or rescission of the finding, determination and order of the Commission made on July 21, 1914, [see ante p. 52] and for leave to withdraw the original petition for a Certificate of Public Convenience, evidencing the Commission's approval of the ordinance contract between the Consumers Electric Company of the Borough of Exeter and the Borough of Exeter, as evidenced by an ordinance of the Borough of Exeter approved the 23d day of November, 1913, and acceptance thereof by the said company dated the 25th day of November, 1913, and an amendatory ordinance approved the 16th day of December, 1913, and acceptance thereof by said company dated the 23d day of December, 1913, which said amendatory ordinance was erroneously referred to in the report, finding and determination of the Commission as of February 16, 1913, and said petitions

having been duly heard and The Public Service Commission having fully considered the same:

*Now, to-wit, March 5, 1915, It is ordered:* That the said petitions for a re-hearing and for a modification or rescission of said finding, determination and order, and for leave to withdraw the above recited original petition, be and the same hereby are refused, and the finding, determination and order of The Public Service Commission made and entered on July 21, 1914, in this matter be and the same hereby are affirmed.

By the Commission,  
SAMUEL W. PENNYPACKER, *Chairman.*

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### ATTORNEY GENERAL.

IN RE APPLICATION OF YORK RAILWAYS COMPANY.

*Street railway companies—Engaging in another business—Holding stock of another company—Constitutional prohibitions.*

A street railway company has the right to acquire, hold, etc., the stock of a light, heat and power company, and by such acquisition, holding, etc.;

1. It is not engaging in a business other than that expressly authorized by its charter forbidden by Art. XVI, Sec. 6 of the Constitution.

2. It is not directly or indirectly engaging in any other business than that of common carriers, forbidden by Art. XVII, Sec. 5 of the Constitution.

To A. B. MILLAR, *Secy., Public Service Commission.*

SIR:

In the matter of the application of the York Railways Company et al. to the Public Service Commission, No. 209 Application Docket, 1914, for certificates of public convenience, in which you desire an official opinion whether the said application can properly be granted by the Commission under the provisions of the Constitution of the State (see letter of William N. Trinkle, Esq., to Hon. John C. Bell, Attorney General, January 7, 1915), I assume your inquiry to be, whether in view of Article 16, Section 6, of the Constitution, which is:

“No corporation shall engage in any business other than that



expressly authorized in its charter, nor shall it take or hold any real estate except such as may be necessary and proper for its legitimate business."

and of Article 17, Section 5, which is:

"No incorporated company doing the business of a common carrier shall, directly or indirectly prosecute or engage in mining or manufacturing articles for transportation over its works, nor shall such company directly or indirectly engage in any other business than that of common carriers, or hold or acquire lands, freehold or leasehold, directly or indirectly, except such as shall be necessary for carrying on its business; but any mining or manufacturing company may carry the products of its mines and manufacturing factories on its railroad or canal not exceeding fifty miles in length."

the York Railways Company, a street railway company, a Pennsylvania corporation, has the legal right to "purchase, acquire, take and hold the absolute ownership or controlling right, title and interest" in a Light, Heat and Power Company of this or of any other State.

The Act of July 2, 1901, P. L. 603, provides:

"Section 1. Be it enacted, etc., That hereafter any corporation, organized for profit, created by general or special laws, may purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of, the shares of the capital stock of, or any bonds, securities or evidences of indebtedness created by, any other corporation or corporations of this or any other State, and while the owner of said stock may exercise all the rights, powers and privileges of ownership, including the right to vote thereon.

"Section 2. All acts or parts of acts, general or special, inconsistent herewith, be and the same are hereby repealed."

Street railway companies and electric light companies are corporations engaged for profit and hence are included in said act, and the railway company is thereby empowered to purchase and hold the stock of the Light, Heat and Power Company, "and while owners of the stock may exercise all the rights, powers and privileges of ownership including the right to vote thereon," unless it is prohibited by the constitutional provisions above cited.

It is held by the Supreme Court in *Commonwealth v. New York, etc., R. Co.*, 132 Pa. 607, and 139 Pa. 457:

"It must not be forgotten, however, that controlling real estate, by means of the ownership of a majority of the stock of such corporation, is a very different matter from holding the title to such real estate. The one is legalized by the Act of 1869; the other is forbidden by the Act of 1855."

Article 17, Section 5, of the Constitution, which prohibits an incorporated company doing the business of a common carrier from engaging in any other business than that of a common carrier, and Article 16, Section 6, which prohibits a corporation from engaging in any business other than that expressly authorized by its charter, do not prevent such an incorporated company from acquiring and holding a controlling interest in the stock, etc., of another company engaged in another business.

The Supreme Court in that case makes a clear distinction between control of another company by the holding of a majority of its stock, and the direct holding of title, etc., of the property itself, and thereby engaging in its business.

The Supreme Court of the United States in *Pullman Car Co. v. Missouri Pacific Co.*, 115 U. S., 597, held:

"The Missouri Pacific Company has bought the stock of the St. Louis, Iron Mountain and Southern Company, and has effected a satisfactory election of directors, but this is all. It has all the advantages of a control of the road, but that is not in law the control itself. Practically it may control the company, but the company alone controls its road. In a sense, the stockholders of a corporation own its property, but they are not the managers of its business or in the immediate control of its affairs. Ordinarily they elect the governing body of the corporation, and that body controls its property. Such is the case here. The Missouri Pacific Company owns enough of the stock of the St. Louis, Iron Mountain and Southern to control the election of directors, and this it has done. The directors now control the road through their own agents and executive officers, and these agents and officers are in no way under the direction of the Missouri Pacific Company. If they or the directors act contrary to the wishes of the Missouri Pacific Company, that company has no power to prevent it, except

by the election, at the proper time and in the proper way, of other directors, or by some judicial proceeding for the protection of its interest as a stockholder. Its rights and its powers are those of a stockholder only. It is not the corporation, in the sense of that term as applied to the management of the corporate business or the control of the corporate property."

The distinction drawn in the cases cited appears to be narrow if the prohibitive acts (in *Commonwealth v. New York, etc., R. Co.*, and the *Pullman Company v. Missouri Pacific Co.* cases) had been construed as to the intention of its framers instead of by the letter, but they control the question you have submitted to me, and I therefore advise you that the York Railways Company has the right to acquire, hold, etc., the stock, bonds, etc., of a Light, Heat and Power Company, and that by such acquisition, holding, etc.:

(1) It is not engaging in a business other than that expressly authorized by its charter forbidden by Article XVI, Section 6, of the Constitution, and,

(2) It is not directly or indirectly engaging in any other business than that of common carriers, forbidden by Article XVII, Section 5, of the Constitution.

Respectfully submitted,

FRANCIS SHUNK BROWN, *Attorney General.*

March 12, 1915.

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## COUNTY COURT OPINIONS.

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COMMONWEALTH *v.* THE WILKES-BARRE & HAZLETON R. R. CO.

*Tax on corporate loans—Holding companies—"Doing business"*  
*Act of June 30, 1885, P. L. 193.*

The defendant, a New Jersey corporation, is a holding company owning practically all of the capital stock of three corporations doing business in this state. It has no office and no agent here and has used none of its property nor invested any of its capital here. Upon appeal from a settlement by the Commonwealth for tax on its bonds held by residents of Pennsylvania it was

*Held:* 1. Owning and holding the stocks and bonds of the three corporations and receiving dividends and interest thereon, is not "doing business," within the meaning of the Act of June 30, 1885, P. L. 193.

2. If the owning and holding of stocks and bonds be "doing business" then such business was done outside of this State, for the situs of the stocks and bonds is in New Jersey, the domicile of the defendant.

Appeal from settlement of tax on corporate loans. C. P. Dauphin Co. Nos. 97, 98, 99, 100, and 101, Commonwealth Docket, 1913.

*Wm. M. Hargest*, Asst. Deputy Atty. Gen. for Commonwealth.

*Frank M. Eastman*, for defendant.

KUNKEL, P. J., March 31, 1915:

These are appeals by the defendant from settlements against it for loan tax for the years 1901, 1902, 1903, 1904 and 1905. By agreement of the parties they have been consolidated to No. 97 Commonwealth Docket, 1913, and submitted to us for trial without a jury. The facts are as follows:

#### FACTS.

The defendant company was incorporated under the laws of the State of New Jersey and has its principal and only office in Jersey City, in that state. It was formed for the object of carrying on the business of an electric light company, of a gas company, of a compressed air company, of a transportation company outside of the State of New Jersey, of a water company, to purchase and sell patent rights, and (7) "To hold and own bonds, mortgages, debentures, notes, shares of capital stock, securities, obligations and other evidences of indebtedness, of any public or municipal corporation or of the government of the United States or any state thereof, and any corporation, association or company engaged in the manufacture of light, heat and power, by electricity, water, gas, gasoline, fuel, air, or by any and every medium or means for said purpose, and of any corporation, association or company engaged in supplying water for any and for every purpose, and of any corporation, association or company engaged in transporting passengers or freight or both, on land or water, by means of any kind of power, and to receive, collect and dispose of interest, dividends and income derived from the assets so acquired, held and owned by this corporation, and to sell, acquire, transfer,

mortgage, pledge or otherwise dispose of shares of capital stock or other evidences of indebtedness of any corporation, public or private, and while the holder of said stock to exercise all rights and privileges of ownership, including the right to vote thereon, to the same extent as a natural person might or could do." During the years 1901 to 1905, inclusive, it owned practically all the capital stock and all of the bonds of the Wilkes-Barre and Hazleton Railway Company and of the Lehigh Traction Company, and, from October 1, 1903, the stock and bonds of the Wilkes-Barre Terminal Railroad Company, corporations formed and existing under the laws of this State, which paid during each of the years mentioned taxes on their capital stock, loans and gross receipts. On May 15, 1901, it assigned the bonds and shares of stock of the Wilkes-Barre and Hazleton Railway Company and of the Lehigh Traction Company to the Guarantee Trust Company of New York, in trust to secure the holders of \$2,500,000 of bonds issued by it, and on October 1, 1903, it assigned also the stock and bonds of the Wilkes-Barre Terminal Railroad Company to the same trust company, to secure the holders of additional bonds issued by it. These are the bonds or indebtedness on account of which the tax is here sought to be recovered. By the terms of the transaction the interest upon the bonds was made payable by the defendant at the office of the trust company in the City of New York, and during the years in question the interest was so paid, without deducting the tax on that part of the indebtedness held by residents of this State. The bonds or indebtedness outstanding during the years 1901 to 1905, inclusive, were as follows: in the year 1901, \$642,000; in the year 1902, \$1,400,000; in each of the years 1903, 1904 and 1905, \$1,900,000. One and eight-tenths per cent. of these bonds were held by residents of this State and were subject to taxation.

The defendant's operations in New Jersey were confined during the period covered by these settlements to the keeping of an office in that state, as required by law, where its stock transfer books were kept and the annual stockholders' meetings were held. Its only property physically present in that state during that time were its transfer books. During the same period its directors' meetings were held in this State and its bank account was kept

here, the amount of which did not at any one time exceed two or three hundred dollars. When the interest became due upon its bonds the moneys to pay the same were received from its underlying companies by its treasurer, who resided in this State, and were immediately forwarded by him to the trust company in New York, where they were paid to the holders of the bonds. Many of the stockholders and some of the directors of the defendant company are non-residents of Pennsylvania. The defendant owns no stock or bonds of any other corporation. It operates in no other capacity than as the holder and owner of the stocks and bonds of the Lehigh Traction Company, the Wilkes-Barre and Hazleton Railway Company and the Wilkes-Barre Terminal Railroad Company. It has no agent or office for the transaction of business in this State.

On May 19, 1913, the accounting officers of the Commonwealth settled accounts against it for tax on an indebtedness of \$1,900,000 for the years 1901, 1902 and 1903, charging it in each account with the sum of \$7,512; on the same day they settled accounts against it for tax on an indebtedness of \$3,127,000, for the years 1904 and 1905, charging it in each account with the sum of \$12,395.46. From these settlements the defendant duly appealed.

#### DISCUSSION.

By the Act of June 8, 1891, P. L. 229, a tax of four mills is imposed upon all corporate indebtedness owned or held in this State. By Section 4 of the Act of June 30, 1885, P. L. 193, the treasurer of every foreign corporation doing business in the Commonwealth, as well as of every domestic corporation, is required to assess and collect the tax by deducting the same from the interest paid upon its corporate indebtedness held by residents of this Commonwealth. *Com. v. Wilkes-Barre and Scranton Ry. Co.*, 162 Pa. 614. Wilful failure or neglect to perform this duty renders the corporation itself liable for the tax. *Com. v. Del. Div. Canal Co.*, 123 Pa. 594; *Com. v. L. V. R. R. Co.*, 129 Pa. 429; *Com. v. Phila. and Read. R. R. Co.*, 150 Pa. 312; *Com. v. L. V. R. R. Co.*, 186 Pa. 235. The defendant company having failed to collect the tax during the years covered by the settlements appealed from, the Commonwealth calls upon it for payment. It will be ob-

served that the act applies only to such foreign corporations as are doing business in this State. The question presented is whether under all the facts of this case the defendant company was doing business in this State within the meaning of the Act of 1885. It denies that it was doing business in the State and contends therefore that it was not required to collect the tax upon its loans.

The defendant is what is known as a holding company. It owns and holds the stock and bonds of the Lehigh Traction Company, the Wilkes-Barre and Hazleton Railway Company and the Wilkes-Barre Terminal Railroad Company. These several companies are operating in the State of Pennsylvania and are subject to and have complied with the tax laws of the state. Holding the stock and bonds of these companies, the defendant company received the dividends on the stock and the interest on the bonds. It did nothing more. It may be said that one of the objects for which it was formed was to do this very thing, but we do not think that this alone amounted to doing business in the state; nor did the action of its treasurer in sending to New York its money to pay the interest on its own indebtedness amount to doing business. The phrase "doing business," as used in the revenue legislation of the State respecting a corporation, has been held to be equivalent to the term investing its capital or property in this State or using its property in the state in furtherance of its corporate purposes. *Com. v. Standard Oil Co.*, 101 Pa. 132; *Com. v. Telephone Co.*, 129 Pa. 217. And on the meaning of the term "doing business" in the Act of April 22, 1874, P. L. 108, which provides, "No foreign corporation shall do any business in this Commonwealth" until it shall have established an office and appointed an agent for the transaction of its business here, it was said in *Pavilion Co. v. Hamilton*, 15 Pa. Super. Ct. 389, "The tests of the application of the Act of 1874, as shown by previous adjudications in Pennsylvania, are whether the foreign corporation shall have an agent in the State of Pennsylvania; or shall have offices for the general conduct of its business in the State; or shall conduct its corporate business in the State; or shall have a part of its capital invested in the State." It does not appear that the defendant used any of its property in the State or invested any of its capital here, nor did it

have an agent or an office for the transaction of its business in this State. Owning and holding the stock and bonds of the three corporations, and receiving the dividends on the stock and interest on the bonds, cannot be viewed as doing business within the meaning of the term as used in the Act of 1885. But if it should be held that this was doing business, then, as the stock and bonds were of that kind of personal property whose location or situs was the domicile of the defendant and the defendant's domicile was the State of New Jersey, that which is claimed to have amounted to doing business was not done in this State but in the latter state. *Com. v. Curtis Pub. Co.*, 237 Pa. 333. Nor did the fact that the treasurer resided in this State and acted as such here, or that the directors held their meetings here, constitute, without more, the doing of business by the defendant in this State, so as to subject it to the duty of assessing and collecting the tax on its loans.

#### CONCLUSIONS.

We therefore conclude:

1. That the defendant company was not doing business in this State within the meaning of Section 4 of the Act of June 30, 1885.
2. That Section 4 of the Act of June 30, 1885, did not apply to the treasurer of the defendant company.
3. That the defendant company is not liable for the tax on its bonded indebtedness charged in the settlements appealed from.
4. That the defendant is entitled to judgment.

Wherefore, judgment is directed to be entered against the Commonwealth and in favor of the defendant, unless exceptions be filed within the time limited by law.

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#### COMMONWEALTH v. THE WESTINGHOUSE AIR-BRAKE CO.

*Tax on capital stock—Investments in securities of other corporations—Manufacturing corporations—Exemption.*

1. A corporation is not liable for tax on that part of its capital stock represented by shares of stock held by it in other corporations doing business in Pennsylvania and liable to the capital stock tax or relieved therefrom.
2. A corporation is liable to taxation on that part of its capital stock represented by shares of stock held by it in corporations which are not



doing business in this State and whose capital stock is not liable to taxation here.

3. Where a corporation owns tangible property permanently located outside of this State but does so by means of the ownership of all the capital stock of a corporation organized in a foreign state to hold and operate the property, the court will look at the substance of the transaction. That part of the capital stock represented by such ownership is not taxable here. The case is the same as if such ownership were evidenced by a deed or bill of sale.

4. A manufacturing corporation is taxable on all of its capital stock not actually and exclusively employed in manufacturing in this State, and the fact that it invested certain capital in securities of foreign corporations for the purpose of securing business for its manufacturing plant here does not exempt that part of its capital stock from taxation.

Appeal from settlement for tax on capital stock. C. P. Dauphin County. No. 561, Commonwealth Docket, 1909.

*Wm. M. Hargest*, Asst. Deputy Atty. Gen. for Commonwealth.

*Olmsted and Stamm*, for defendant.

KUNKEL, P. J., April 7, 1915:

This is an appeal by the defendant company from the settlement of an account against it for tax on its capital stock for the year 1908. It has been submitted to us for trial without jury. We find the facts to be as follows:

#### FACTS.

1. The defendant company is a corporation of this State incorporated for the purpose of taking and holding patents granted by the United States covering what is known as the Westinghouse air-brake and the manufacture and sale of the brakes as covered by the patents. It has never engaged in any business other than the manufacture of the brakes and was engaged in that business during the tax year 1908. Its general office and place of business is in the City of Pittsburgh, this State, and the manufacturing was carried on in its plant in Allegheny County near that city.

2. On June 18, 1909, the accounting officers of the Commonwealth settled an account against it for tax on its capital stock for the year ending the first Monday of November, 1908, charging it with a tax of \$29,353.08 on \$5,870,617 of its capital stock. From

this settlement the defendant, having paid \$8,000 on account, duly appealed.

3. The capital stock on which the tax was charged was made up of the following items:

Interests in Westinghouse Brake Company, Limited, of London, England, .....	\$983,484.10
Interests in the Canadian Westinghouse Company, Limited, of Canada, .....	1,065,500.00
Balance due company on houses sold to employees, .....	34,449.56
Dwelling houses owned by company, .....	571,948.80
Other real estate not covered by manufacturing plant, .....	103,051.20
Stocks and bonds of railroad and other companies, .....	3,112,184.89
<b>Total, .....</b>	<b>\$5,870,617.64</b>

The stocks and bonds of railroad and other companies and their values referred to were as follows:

Westinghouse Machine Co., ..... Stock,	\$30,000.00
Westinghouse Air-Brake Co., ..... Stock,	272,550.00
Westinghouse Elec. & Mfg. Co., ..... Stock,	20,000.00
British Westinghouse Elect. & Mfg. Co., Stock,	165,082.26
Union Switch & Signal Co., ..... Stock,	6,935.00
Heintz Heating System, ..... Stock,	38,800.03
International Construction Co., ..... Stock,	220,000.00
Nernst Lamp Co., ..... Bonds,	351,975.00
Mexican Car & Foundry Co., ..... Bonds,	25,000.00
Allegheny County Light Co., ..... Bonds,	1,000.00
Lackawanna & Wyoming Val. R. T. Co., Bonds,	7,200.00
National Brake & Electric Co., ..... Bonds,	480,000.00
National Brake & Electric Co., ..... Stock,	500,000.00
Societe Anonyme Westinghouse, Paris, Stock,	555,010.00
Westinghouse Company, Ltd., Russia, .. Stock,	370,030.00
Westinghouse Traction Brake Co., .... Stock,	100,000.00
Westinghouse Auto. Air & Steam Coupler Co., ..... Stock,	65,000.00
Sundry items, .....	3,601.00
<b>Total, .....</b>	<b>\$3,112,185.89</b>

The values of these stocks and bonds were at first returned by the defendant to the auditor general as above stated, but different

values have since been shown by the affidavit of the defendant's vice-president with respect to some, as follows:

British Westinghouse Electric & Mfg.	
Co., .....	Stock, \$10,000.00
Nernst Lamp Company, .....	Bonds, 288,800.00
Mexican Car & Foundry Company, ...	Bonds, 10,000.00
Allegheny County Light Company, ....	Bonds,
Lackawanna & Wyoming Val. R. T. Co., Bonds,	
	4,000.00
Societe Anonyme Westinghouse, Paris, Stock,	250,000.00
Westinghouse Company, Ltd., Russia, ..	Stock, 70,000.00
Westinghouse Auto. Air & Steam Coup-	
ler Co., .....	Stock, 5,000.00

These latter values we have adopted for the purposes of this case.

4. The defendant's investment of the value of \$1,065,500 in the Canadian Westinghouse Company, Limited, of Canada, was made under the following circumstances: The defendant for many years sold in the Dominion of Canada brakes manufactured at its factory in Pittsburgh, but owing to the tariff policy adopted by the Canadian government it became necessary to transfer the manufacture of a part of the brake equipment to Canada in order to avoid the loss of the business. It, therefore, established a plant at Hamilton, Ontario, and in compliance with the laws of Canada formed an organization known as the Canadian Westinghouse Company, Limited. It owns the entire capital stock of that company. By this expedient it has been possible to maintain its business in Canada and secure the sale and use of a very considerable quantity of the brake apparatus manufactured in Pennsylvania that would otherwise have been manufactured elsewhere.

5. The Westinghouse Machine Company, in which the defendant holds stock to the value of \$30,000, the Westinghouse Air-Brake Company, in which the defendant holds stock to the value of \$272,550, the Westinghouse Electric and Manufacturing Company, in which the defendant holds stock to the value of \$20,000, the Westinghouse Traction Brake Company, in which the defendant holds stock to the value of \$100,000, and the Union Switch and Signal Company, in which the defendant holds stock to the value of \$6,935, are corporations doing business in this State and are

liable to the capital stock tax or have been relieved therefrom. It is not claimed that the other companies whose stocks the defendant holds are liable to or relieved from the capital stock tax under the statute.

6. The shares of stock of the International Construction Company owned and held by the defendant were acquired by it in order to enable it to secure from that company the contract for brakes and draft gear material for use on the railroads which it was building.

The bonds of the value of \$25,000 of the Mexican Car and Foundry Company owned and held by the defendant company were taken by it for the purpose of securing contracts for the sale of its manufactured products in Mexico.

8. The stock of the National Brake and Electric Company of the value of \$500,000 and the bonds of that company of the value of \$480,000 were acquired by the defendant company under the following circumstances: The National Brake and Electric Company was a corporation organized under the laws of Wisconsin and owning a plant in Milwaukee. About the year 1905 its property was sold at receiver's sale and purchased by or on account of the defendant, which caused a new company to be organized under the laws of Wisconsin to hold the property. The defendant owns all the stock and all the bonds, and the plant is used for the manufacture of air-brakes for street cars. The \$980,000 represents the purchase by the defendant of the manufacturing plant. This property is taxed and all taxes paid thereon in the State of Wisconsin and the burden falls, directly or indirectly, upon the defendant company.

9. The defendant concedes its liability on so much of its capital stock represented by

Balance due company on houses sold to employees, .....	\$34,449.56
Dwelling houses owned by company, .....	571,948.80
Other real estate not covered by manufacturing plant, .....	103,051.20
Nernst Lamp Company, Bonds, .....	288,800.00
Allegheny Light Company and Lackawanna & Wyoming Val. R. T. Co., Bonds, .....	4,000.00
Sundry items, .....	3,601.00

## DISCUSSION.

1. It is manifest that the defendant company is not liable for tax on that part of its capital stock represented by the shares of stock held by it in other corporations doing business in Pennsylvania and liable to the capital stock tax or relieved therefrom. These aggregate \$429,485, which amount must be deducted from the total capital stock upon which the tax has been computed and charged in the settlement. Act of June 8, 1891, P. L. 229; Com. v. Fall Brook Coal Co., 156 Pa. 488; Com. v. Lehigh C. & N. Co., 162 Pa. 603; Com. v. U. G. I. Co., 162 Pa. 602.

2. We are not prepared to adopt the contention of the defendant that that part of its capital stock represented by shares of stock in the several corporations, whose property is not in the State or which are not doing business here, is not taxable. It is quite true in Com. v. Fall Brook Coal Co., 156 Pa. 488; Com. v. Lehigh C. & N. Co., 162 Pa. 603, and in Com. v. U. G. I. Co., 162 Pa. 602, it was said that there was no distinction to be made between capital stock and shares of capital stock, and that the taxation of the one was the taxation of the other. That, however, was only one of the reasons on which the decisions in those cases rested. They were placed also upon the provision of the taxing statutes which expressly excepted from taxation the shares of stock of corporations liable to the capital stock tax or exempted therefrom. Act of June 1, 1889; Act of June 8, 1891, P. L. 229. It was clear from the provision in the statutes that there was no intention to impose a tax on both the capital stock and the shares of which it was composed, but the exact contrary appeared. We would be carrying the conclusion there reached far beyond what we think the court ever intended it should be carried, if we were to hold the shares of capital stock owned by a Pennsylvania corporation in other corporations not doing business in the State, and whose capital stock is not taxable in this State, to be exempt from taxation. In speaking of the scheme under the statute for the taxation of stocks, Williams, J., in Com. v. Fall Brook Coal Co., supra, said: "This scheme includes every share of the stock in corporations created by, or doing business in, this State, wherever it may be owned, by imposing the tax on the corporation. It in-

cludes every share of stock in corporations which the State cannot reach that may be held by any taxpayer by requiring him to disclose his ownership, and then assessing the shares he holds directly to him." Thus the shares of stock are only relieved from taxation when the capital stock itself is taxed. The double taxation referred to in the Fall Brook and other cases was that which would have resulted from the taxation twice by the same taxing power of what was regarded as the same subject. The case presented by this appeal is quite different. The subject of the tax here is the capital stock of the defendant company. Its capital stock is represented by the shares of stock which it holds in other corporations outside of this State. Those shares are taxable in this State, but the capital stock which they compose is not in this State and not subject to the taxing jurisdiction of this State. The statutory exception, therefore, does not apply. We are of opinion that the capital stock which is represented by shares of stock in the corporations which were not doing business in this State, and whose capital stock was not liable to taxation here, is taxable. The conclusion reached in *Com. v. American Water Works and Guarantee Co., 2 Dau. Co. Rep. 212*, although supporting the defendant's contention, could just as well have rested on the well recognized doctrine declared in *Com. v. Curtis Pub. Co., 237 Pa. 333*.

3. The defendant contends that it is the real owner of the Wisconsin and Canadian companies; that having purchased the manufacturing plant in Wisconsin at a receiver's sale it became the owner, and that it was not any the less the owner because it erected a corporation under the name of the National Brake and Electric Company and holds the property by means of the stock in that company. It argues that having thus become the owner of property located permanently out of the State, such property is not subject to taxation here, and, if not, its value must be deducted from the aggregate capital stock upon which the tax has been charged in this settlement. The same contention is made with respect to the Canadian Westinghouse Company, Limited. The defendant established a plant at Hamilton, Ontario, and formed an organization known as the Canadian Westinghouse Company, Limited, for the purpose of maintaining its business in Canada.

It holds the plant through the medium of the stock in that company. It thereby became none the less the real owner of the plant. It owns the plant and the evidence of its ownership is the shares of stock which it holds in that corporation.

It must be conceded that the capital stock tax is a property tax and that the capital stock represented by tangible property permanently located outside the State cannot be taxed here. *Com. v. American Dredging Co.*, 122 Pa. 386; *Com. v. Penna. Coal Co.*, 41 Leg. Int. 125; *Com. v. Westinghouse Mfg. Co.*, 151 Pa. 265. If the title to the plant and property in Wisconsin and in Ontario were evidenced by a deed or a bill of sale they would not be taxable in this State and the capital stock represented by them would not be taxable here. Does the fact that the title and ownership of the properties thus evidenced by the capital stock in the corporations erected as a means by which to hold and operate the properties constitute the defendant any the less the owner of property outside of the State? The like question arose before this court in *Com. v. Lehigh Valley Railroad Company*, 3 Dau. Co. Rep. 309. There the Lehigh Valley Railroad Company, a Pennsylvania corporation, constructed and equipped a railroad in New Jersey with its own money and for its own business purposes in the name of a corporation chartered under the laws of that state. It thus acquired all the capital stock of the New Jersey company. Judge Simonton held in that case that the Lehigh Valley Railroad Company's ownership of the stock of the New Jersey company was the ownership of property in New Jersey, and that it could not be taxed in this State with respect to that portion of its property. In the course of his opinion he said: "The natural legal inference from these facts would undoubtedly be that defendant was the real owner of the road, notwithstanding the use of the name of the Easton and Amboy Company in constructing it, and if this company and defendant were contending for the ownership, we should have no difficulty in looking beneath the form of the transaction to the substance and determining in favor of the latter. If this, be so, then, unless there be something in the nature of the case now before us which forbids us to look at the substance and requires us to judge from the form alone, we must come to the same conclusion. But there is manifestly nothing

which thus restricts our view. The courts have always, in construing and applying these taxing acts, looked at the real nature of the transaction and applied them to the real substance and facts of each case. This has been so often said and illustrated, that we now content ourselves with referring to *Com. v. Pittsburgh, Fort Wayne and Chicago Railway Co.*, 74 Pa. 83, and *Com. v. Erie and Pittsburgh Railroad Co.*, 74 Pa. 94, and the cases there cited, as examples of the manner in which it has been done." Applying what was said in that case to the present one and looking through the form to the substance, we conclude that the capital stock of the defendant company represented by its ownership of the plants and properties in Wisconsin and Canada is not taxable in this State.

4. The investment of the defendant company in the stock of the International Construction Company and in the bonds of the Mexican Car and Foundry Company it is contended is not taxable, because both of these investments were made with a view of aiding and enhancing the defendant's manufacturing business; in the one case to secure contracts for brakes and draft gear material for use on a railroad which the Construction Company was constructing, and in the other case for the purpose of securing contracts for the sale of defendant's manufactured products in Mexico. We do not think these are sufficient reasons for holding that the defendant's capital stock represented by those securities is not taxable. The exemption allowed to manufacturing corporations is to so much of their capital stock as is actually and exclusively employed in manufacturing in this State. It is sufficient to say of these investments that they do not represent capital stock employed in carrying on manufacturing in this State.

#### CONCLUSIONS.

We therefore conclude: That the Commonwealth is entitled to recover as follows:

[Here follows an itemized account showing charges and deductions according to the above opinion and deducting amount of tax already paid.] Total \$6,856.34 for which amount judgment is directed to be entered in favor of the Commonwealth and against the defendant unless exceptions be filed according to law.



## COMMONWEALTH v. WEST PENN STEEL COMPANY.

*Bonus—Foreign corporation—What is capital employed in this State.*

A foreign corporation doing business in this State is liable for payment of bonus on the value of its property as shown by the value of buildings, machinery, etc., at its plant in this State and the value of raw material on hand; but not on the value of "Cash and Current Assets" and "Bills and Accounts Receivable," nor on the value of finished products at the plant when such value is included in the value of raw material on which bonus has been paid.

Appeal from settlement for bonus. C. P. Dauphin Co. No. 542, Commonwealth Docket, 1911.

*Wm. M. Hargest*, Asst. Deputy Atty. Gen. for Commonwealth.

*George M. Hosack*, for defendant.

McCARRELL, J., April 12, 1915.

The defendant is a New Jersey corporation, organized November 25, 1908, "for the manufacture of iron and steel sheets, bars, etc." It began business in Pennsylvania December 17, 1908, locating its plant and office at Brackenridge, Pa. It admits its liability for bonus upon so much of its capital stock as is actually employed wholly in Pennsylvania. The only dispute is as to the amount of capital so employed. Trial by jury has been duly waived, and from the testimony submitted we find the following:

## STATEMENT OF FACTS.

The affidavit of Mr. Burdick, the treasurer, offered in evidence by the defendant, shows the following investments, to wit,—

Inventory representing property located at Brackenridge, Penn'a.

Raw material, .....	\$104,654.77	
Finished product, .....	88,985.27	
	<hr/>	\$193,640.04
Value of property, representing actual book value of the build- ings, machinery, etc., at its plant	\$761,195.70	

Accounts and bills receivable due the company from customers for goods which it manufactur- ed and sold to them . . . . .	\$263,817.21	
Cash and current assets repre- senting cash and cash items . . .	9,835.48	
	<hr/>	\$1,034,848.39
		<hr/>
		\$1,228,488.43

The settlement for bonus made September 25, 1911, is upon \$1,227,448. According to this settlement the capital previously employed in Pennsylvania was only \$1,000.

#### DISCUSSION.

There can be no question but that the value of the property as shown by the value of the buildings, machinery, etc., at its plant is \$761,195.70. The testimony also shows that the value of raw material at the plant was \$104,654.77. Upon these two items we are of opinion that the bonus is properly payable. The finished product at the plant is doubtless the result of the working up of a portion of the raw material above referred to. The item of accounts and bills receivable amounting to \$263,817.21 is included in the amount of the bonus settlement, and in accordance with the decision of the Supreme Court in *Comm. v. G. W. Ellis Co.*, 237 Pa. 328, rendered since settlement, this amount cannot properly be made the subject of bonus. The item of cash and current assets, representing cash and cash items, \$9,835.48, does not appear from any testimony submitted to be property employed wholly in Pennsylvania. How much is in cash is not stated, and what the nature of the current assets and cash items may be does not appear. If they are accounts due the company from customers, they are not to be considered in the settlement of the bonus. We are of opinion that the company is liable for bonus upon the following, to wit:—

Value of plant at Brackenridge, . . . . .	\$761,195.70
Raw material at plant, . . . . .	104,654.77
	<hr/>
Deduct amount included in original bonus set- tlement, . . . . .	1,000.00
	<hr/>
Increase subject to bonus, . . . . .	\$864,850.47

The bonus of one-third of 1% upon this amount is, .....	2,882.83
Interest from Nov. 27, 1911, .....	583.77
	<hr/>
	\$3,466.60
Attorney General's commission 5% .....	173.33
	<hr/>
Amount now due the Commonwealth, .....	\$3,639.93

#### CONCLUSION.

We therefore direct that judgment be now entered in favor of the Commonwealth and against the defendant for the sum of \$3,639.93, unless exceptions be filed within the time limited by law.

#### COMMONWEALTH v. PENN MUTUAL LIFE INS. CO.

*Mutual life insurance companies—Tax on gross premiums—Deduction of annual dividends—Act of June 1, 1889, P. L. 420, Sec. 24.*

A mutual life insurance company is not liable for the tax of eight mills on gross premiums on the full amount of the maximum premiums which it is entitled to collect from its policy holders. The total amount of the so-called "dividends," consisting of the divisible surplus apportioned annually among the policy holders, must be deducted. This amount does not consist of "premiums or assessments received" within the meaning of Act of June 1, 1889, P. L. 420, Sec. 24, but is merely an excess of prior contributions over and above all expenses. It is neither demanded nor received by the company.

Appeal from settlement of tax on gross premiums. C. P. Dauphin County. Nos. 31, 32, 33 and 144, Commonwealth Docket, 1913.

*Wm. M. Hargest*, Asst. Deputy Atty. Gen. for Commonwealth.

*Snodgrass & Smith* and *George Pepper*, for defendant.

MCCARRELL, J., April 22, 1915.

The defendant is a mutual life insurance company incorporated by the State of Pennsylvania. It has no capital stock and conducts its business upon the mutual plan. The accounting officers

of the State have made four settlements against the defendant company for tax on gross premiums, from each of which settlements the company has appealed. Trial by jury has been duly waived. From the evidence submitted we find the following:

#### STATEMENT OF FACTS.

The defendant company conducts its business upon what is known as the "level premium plan." "Under this plan the maximum annual contribution which any member can be called upon to pay is uniform throughout the life of the policy. The member pays during his early years a sum in excess of the current cost of his insurance. This excess is applied to the creation of a reserve or individual insurance fund, which serves to maintain the insurance in the later years, when the stipulated level premium would be insufficient to meet the current cost of insurance on the natural premium plan. At the end of each year the excess of income over disbursements is ascertained, and after setting aside so much of said excess as is required for the increase in policy reserves and other liabilities the balance is treated as a resource, enabling the company thereafter to demand from the policy-holders less than the stipulated premium. Each policy-holder's share in this so-called fund is then ascertained and before his next premium falls due he is advised of the amount thereof, and that the company, if he wishes to use it in abatement of premium, will accept in full settlement of such premium the difference between the premium written in his policy and the amount standing to his account with the company which has arisen out of the previous premium payments. Unless used in the abatement of premiums the policy-holder may, if he desires, withdraw his share of the so-called fund in cash, permit it to accumulate; or this share is paid to him if he discontinues his policy, or is paid in addition to the amount insured if the policy becomes a death claim. For the first year of each policy the company invariably collects the maximum premium stipulated in the policy, and such premiums form part of the company's taxable income for their respective years. This method of calculating premiums and ascertaining and disposing of the excess at the end of each year is practiced not only by the defendant company but other mutual life insurance companies

generally." One of the by-laws of the defendant company thus provides:

"This policy shall participate in surplus and the company will annually determine and account for the portion of the divisible surplus accruing thereto. The owner of this policy shall have the right in any year to have the current dividend arising from such participation applied to reduce the premium, to increase the amount insured, or to accumulate to its credit at 3 per cent. compound interest per annum, which accumulation will be payable at the maturity of the policy, or may be withdrawn at any premium anniversary. If no other option is selected dividends may be withdrawn in cash."

If the policy-holder desires to have his share of the excess over and above the expenses for the year applied to the payment of the premium then maturing, the company's receipt shows that it has been so applied and designates the amount actually received by the defendant company. The accounting officers have made their settlements upon the theory that the defendant company has actually received the maximum premiums mentioned in the several policies and has declined to deduct the amounts awarded the several policy-holders as their respective shares of the excess of the maximum premiums over and above the actual and necessary expenses of the company.

The appeal entered to No. 31 C. D. 1913 is for settlement of tax upon premiums for the six months ending December 31, 1911. The accounting officers charge the defendant company with the receipt of the maximum premiums amounting to ..... \$1,790,426.84

As matter of fact the company gave credit for the excess over and above actual and necessary expenses 106,554.31

And the company actually received only ..... \$1,683,872.53

The appeal entered to No. 32 C. D. 1913 is for settlement of tax upon premiums for the six months ending June 30, 1912. The accounting officers charge the defendant company with the receipt of the maximum premiums amounting to ..... \$1,964,324.55

As matter of fact the company gave credit for the excess over and above the actual and necessary expenses ..... 212,115.67

And the company actually received only ..... \$1,752,208.88

The appeal entered to No. 33 C. D. 1913 is for settlement of tax upon premiums for the six months ending December 31, 1912. The accounting officers charge the defendant company with the receipt of the maximum premiums amounting to ..... \$1,883,870.75

As matter of fact the company gave credit for the excess over and above actual and necessary expenses 170,455.11

And the company actually received only ..... \$1,713,415.64

The appeal entered to No. 144 C. D. 1913 is for settlement of tax upon premiums for the six months ending June 30, 1913. The accounting officers charge the defendant company with the receipt of the maximum premiums amounting to ..... \$2,073,455.56

As matter of fact the company gave credit for the excess over and above actual and necessary expenses 205,990.60

And the company actually received only ..... \$1,867,464.96

The Act of June 1, 1889, [P. L. 420, Sec. 24], provides that reports shall be made in writing by insurance companies "To the auditor general semi-annually upon the first days of July and January in each year, setting forth the entire amount of premiums and assessments received by such company or association during the preceding six months, whether the said premiums or assessments were received in money or in the form of notes, credits or any other substitute for money, and every such company or association shall pay into the State Treasury, semi-annually, on the last day of January, and July, in addition to any other tax to which it may be liable under the 1st and 21st sections of this act, a tax of 8 mills upon the dollar upon the gross amount of said premiums and assessments received from business transacted within this Commonwealth."

The question raised by these appeals is whether or not the money deducted by the defendant company from the maximum premiums mentioned in its policies because of the sums credited to the several policy-holders by reason of the excess of their previous contributions over and above all expenses is to be deducted from the maximum premiums. The company has paid the 8 mill tax upon the amounts actually received by it, as per the above statements, and if the Commonwealth is not entitled to a tax upon

the deductions made as above, there is now nothing due from the defendant company.

### DISCUSSION.

The statute imposes the tax upon premiums and assessments received by insurance companies, "either in money or in the form of notes, credits, or any other substitute for money." The amount which the defendant company claims shall be deducted from the maximum premiums is not money received by the company nor is it notes or credits. It is not alleged that the company received notes for the whole or any part of this amount, nor that any credit was given the company for the whole or any part of this sum. Indeed no credit could possibly have been given to the company for it is not pretended that there was any obligation of the company upon which credit could have been given by policy-holders for the premiums payable by them respectively. The company simply had in its possession money due to its policy-holders, which money the policy-holders requested should be credited upon the premiums payable by them respectively, and it was accordingly done. The policy-holders alone received credits. It is only credits received by the company which are taxable under the statute, and the company received no credits in any of these transactions with its policy-holders. The maximum premiums named in the several policies were neither demanded nor received by the company. Under the terms of the contract the policy-holders had the right to demand that their respective shares of their previous contributions over and above the actual and necessary expenses of the company should be credited upon the maximum premiums at each premium paying period, and that upon payment of the balance the policies should respectively be continued in force until the next premium paying period arrived.

The principle here involved was considered and decided by President Judge Simonton of this court in *Commonwealth v. Penn Mutual Insurance Company*, 1st Dauphin Co. Repr. 233. The question there raised was whether these abatements upon premiums was to be regarded as earnings or income of the company taxable under the Act of 1868, and it was held that they were

neither earnings or income. In so concluding Judge Simonton uses the following language:

"We think the so-called 'dividends to policy holders' are not net earnings or income and do not represent such earnings, and that defendant is not liable to tax in respect to them. \* \* \* \* \* It is strenuously contended by the able special counsel for the Commonwealth that because these abatements are entered on the books of the company as dividends to policy holders or surplus to policy-holders they therefore represent net earnings or income, and furnish a measure of the liability of the company to taxation. Whatever these statements may be called, they are in reality what we have stated in the findings of facts. The amounts they represent are mere negative quantities, abstract statements not of what is, or is to be received or to come in, but what is not to be received. The calculations are made for the express purpose of determining how much of the amount which the company might receive shall not be received, and one of the items which make up the apparent amount upon the basis of which this calculation is made, is the sum which was abated and not received during the preceding year. In short, the whole proceeding is merely a method by which the books of the company are made to show what would be the actual gross debtor and creditor accounts of the company if the whole amount of the premiums was collected and a part was afterwards returned to the policy-holders, while in fact it is neither collected nor returned. The reason for fixing the premium stipulated for at a higher rate than sufficient under ordinary circumstances to cover the risk is, of course, that the company may be strong enough to stand in case of extraordinary mortality among its members."

This decision of Judge Simonton was cited at length and approved by the Court of Appeals of Kentucky in *Mutual Benefit Life Insurance Company v. Kentucky*, 33 Ky. L. R. 338 (107 S. W. Repr. 802), in which the State of Kentucky by statute imposed "A two per cent. tax on all renewal premiums received in cash or otherwise" and it was held that abatements upon premiums were not taxable; the conclusion being thus stated:

"The difficulty which surrounds the appellant in this case grows out of its method of bookkeeping and its use of terms out of their ordinary signification. What really happened in every case was that the stipulated premium was much larger



than the company actually needed to carry the risk under ordinary conditions; but if extraordinary conditions should arise, the whole might be needed. Thus, if an epidemic swept over the country the losses among the policy-holders would perhaps be abnormal, and then the company would need the full amount of the contract premium. Now, in order to prepare in advance against such untoward contingencies of the future the company collected the first year the full amount of the premium and set aside so much of it as was over-payment, as a guaranty against misfortune; and then said to its policy-holders: 'You need not pay hereafter the full amount of the stipulated premium, but may omit the overplus because we have already collected from you more than you should have paid under ordinary circumstances, and we are holding that as protection against extraordinary losses.' \* \* \* \* \* The company, on its books, calls this a dividend, and pretends to credit the annual premium with it. Now, the truth is that this overpayment is not a dividend in any sense of the term; nor is the failure of the company to collect the full amount of the premium in after years a credit in any sense of the term. A sum of money applied as a credit can never be used for the same purpose again."

We are satisfied that the deductions made from the maximum premiums as hereinbefore stated were never received by the defendant company either in money, notes, credits or otherwise, and that with respect to these sums the defendant company is not liable to the eight-mill tax. It has paid this tax upon all the premiums which it actually received in money or otherwise, and we therefore have reached the following:

#### CONCLUSIONS.

1. The defendant company is not now indebted to the Commonwealth for tax upon gross premiums.
2. It is therefore now ordered that judgment be entered in each of the cases referred to in the foregoing caption in favor of the defendant and against the Commonwealth unless exceptions be filed within the time limited by law.

## IN RE STATE HAYMAKERS' ASSOCIATION OF PENNSYLVANIA.

*Charters—Name—Similarity.*

The applicants formerly composed the "State Haymakers' Assn. of Penna.," a subordinate body created by the "National Haymakers' Assn. of the U. S." They have now seceded therefrom and present an application for a charter under the title "State Haymakers' Assn. of Penna."

*Held:* 1. The application should be refused. If the National Association should form a subordinate body under the name heretofore employed, as they may do, the use of the names would lead to confusion.

2. Whether the act of the National Association in forming a branch association is *ultra vires* is not the subject of inquiry upon an application for a charter.

Application for charter. C. P. No. 5, Phila. Co. June Term, 1914, No. 910.

*Goldsmith & Sessler*, for petitioners.

*C. W. McConnell*, for exceptants.

PER CURIAM; Feb. 10, 1915.

A petition was presented for a charter of a corporation under the title of the "State Haymakers' Association of Pennsylvania." The application was referred to a master, who recommended approval of the charter. Objections were presented on behalf of the "National Haymakers' Association of the United States." Testimony was taken by the master which established the fact that the "National Haymakers' Association of the United States" was incorporated Jan. 4, 1890, by Court of Common Pleas No. 4 of Philadelphia County, and that there is in existence a body known as the "State Haymakers' Association of Pennsylvania," instituted March 18, 1893, which derives authority from, and is subordinate to, the "National Haymakers' Association of the United States."

At the time application for charter in the present case was filed, the "State Haymakers' Association of Pennsylvania," by reason of being delinquent in reports and *per capita* tax, was in bad standing with the National Association and threatened with suspension.

A meeting was held by some of the members of the State Association, and resolutions were passed declaring the association an independent body, not under the control of the National Association, and authorizing the officers of the State Association to make

application for a charter. Pursuant to that resolution the present application was presented.

The master reported that the National Association is without authority under the terms of its charter to create subordinate organizations; that the name given the State Association by the National Association, having been used by the State Association with the approval and consent of the National Association since 1893, the petitioners are entitled to adopt it as a corporate title; that the word "Haymaker" is one of common use and application, to which there is no exclusive right, and that the title of "State Haymakers' Association of Pennsylvania" can scarcely lead to any confusion, conflict or injury to any property rights of any association known as "National Haymakers' Association of the United States."

To attack in this proceeding the action of the National Society in forming the State Association as *ultra vires*, is equivalent to questioning the validity of the charter: *Freeland v. Pennsylvania Central Ins. Co.*, 94 Pa. 504. The violation of a charter of incorporation cannot be inquired into collaterally (*Association v. Fenner*, 13 Phila. 107); nor can the validity of the charter or the alleged legality of the business transaction be determined in this application for a charter: *Hassinger v. Ammon et al.*, 160 Pa. 245.

It appears from the evidence that petitioners and their associates were members of this subordinate branch of the "National Haymakers' Association of the United States;" that they seceded, and are now about to organize a separate and distinct corporate body under the name and title of "State Haymakers' Association of Pennsylvania," which is the title conferred by the "National Haymakers' Association of the United States" on the subordinate branch of the association in the State of Pennsylvania.

If the National Association continues the branch association in the State of Pennsylvania under the title heretofore employed, and there is no evidence of an intention to abandon it, the incorporation of petitioners under the same title will inevitably lead to confusion.

It was held in *American Clay Manufacturing Co. v. American Clay Manufacturing Co.*, 198 Pa. 189, "that there are two classes of cases involving judicial interference with the use of names,

first, where the intent is to get an unfair and fraudulent share of another's business; and, second, where the effect of defendant's action, irrespective of his intent, is to produce confusion in the public mind and consequent loss to the complainant."

There were cases cited at the argument of this application of charters granted of the second class, but as appears from the opinion of the Attorney-General in *West End Companies*, 12 Dist. R. 373, "the practice of the State Department has been to guard against such similarity only as would be confusing to the State in the imposition and collection of taxes, or would produce uncertainty in the judicial process of courts in which such corporations might sue or be sued."

The petition for approval of the charter under the name of "State Haymakers' Association of Pennsylvania" is refused.

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HAVILAK v. AM. UNION FIRE INS. CO.

*Insurance company—Dissolution—Liquidation of claims—Insurance commissioners—Jurisdiction.*

Under Act of June 1, 1911, P. L. 599, the insolvency of an insurance company having been ascertained and the corporation dissolved, all its property assets, etc., become vested in the insurance commissioner, whose duty then is to liquidate the claims of all creditors, either in full or proportionately, as may be. No other court of the Commonwealth will after that take cognizance of or adjudicate suits pending against the company.

Rule to abate action for want of jurisdiction. C. P. Luzerne County. No. 904, October term, 1912.

*P. J. Schmidt*, for plaintiff.

*J. McGahren*, for defendant.

WOODWARD, J., November 19, 1914.—A præcipe for summons in *assumpsit* in this case was filed on August 9, 1912, and summons exit on the same day, returnable to September 9, 1912. On the same day plaintiff filed a statement. Defendant pleaded and filed an affidavit of defense, and the case being at issue was placed upon the trial list for the week commencing October 19, 1914.

After the inception of the suit and before trial by proceedings

in the Court of Common Pleas of Dauphin County, on March 26, 1913, the defendant company was adjudged to be insolvent and was thereupon dissolved and its corporate existence ended. Charles Johnson, Insurance Commissioner of Pennsylvania, under the power and authority conferred upon him by the Act of June 1, 1911, appointed Thomas P. Donaldson of Philadelphia a special deputy insurance commissioner to take charge of the property of the defendant company and liquidate its affairs; and on October 10, 1914, this rule was granted to show cause why the action should not be abated for want of jurisdiction, returnable October 19, 1914. These facts appear by the petition for the rule and are not denied by counter-affidavit or otherwise.

Under the Act of June 1, 1911, P. L. 599, the insolvency of the defendant company having been ascertained according to law and the corporation dissolved, all its property assets, etc., became vested in the insurance commissioner, whose duty it was under the act to liquidate the claims of all creditors either in full or proportionately according to the amount of assets which might come into his hands. No other court of the Commonwealth would after that take cognizance of, or adjudicate, pending suits against the company.

"The Act of June 1, 1911, P. L. 599, being a comprehensive system for the winding up of insolvent insurance companies, was intended to provide the only method therefor, and since its enactment there is no jurisdiction in any court to appoint a receiver or order the dissolution of an insurance company except under the provisions of the act." Opinion of the attorney general, 22 D. R. 169.

"In all cases in the court where the authority to proceed is conferred by statute and where the manner of obtaining jurisdiction is prescribed by statute, the mode of proceeding therein prescribed is mandatory and must be strictly complied with." *Norwegian Street*, 81 Pa. 349; *Harris v. Mercur*, 202 Pa. 313.

Now, November 19, 1914, the rule is made absolute.

**LOCOMOBILE COMPANY OF AMERICA v. MALONE.**

*Foreign corporations—Registration—Acts of June 8, 1911, P. L. 710, April 22, 1874, P. L. 108—Constitution of Penna. Art. III, Sec. 3, Art. XVI, Sec. 5—Sufficiency of statement.*

1. The Act of June 8, 1911, P. L. 710, providing for registration of foreign corporations, repeals and replaces the Act of April 22, 1874, P. L. 108. It meets the requirements of Art. XVI, Sec. 5, of the Constitution, the purpose of which was to bring foreign corporations within reach of legal process.

2. The Act of 1911 deals with one general subject, viz. foreign corporations, and does not violate Art. III, Sec. 3 of the Constitution.

3. The Act of 1911 was not intended to provide an exclusive means for service of process upon a foreign corporation. Service may still be had upon the agent of the corporation at its place of business.

4. A foreign corporation having registered under the Act of 1911 a principal place of business in this State may maintain a suit to recover for material furnished from another office although such office is not registered.

5. A foreign corporation plaintiff need not show in its statement of claim compliance with Act of June 1, 1889, P. L. 420 requiring registry in the offices of the auditor general, nor with the Act of May 8, 1901, P. L. 150 providing for the payment of bonus.

Demurrer to statement. C. P. Allegheny Co. No. 700, April Term, 1915. Docket D.

*Evans Noble & Evans*, for plaintiff.

*George M. Hosack*, for defendant.

CARPENTER, J. March 23, 1915:

This cause comes into the Common Pleas by appeal from the County Court. The action was brought to recover a balance alleged to be due for goods and merchandise sold and for work and labor done by plaintiff for defendant. It appears by the opinion of Judge Kennedy that defendant admitted a balance due plaintiff and paid same after suit brought.

After appealing, plaintiff filed in this court, a statement of claim in which certain facts not in the original statement are set out, and which raise the question here argued.

In the first statement plaintiff did not specify where it was in-

corporated, but in the second it says that it is "a corporation organized under the laws of the State of West Virginia," and that it "did on the 26th day of July, 1911, register its said company in the office of the Secretary of the Commonwealth of Pennsylvania in compliance with the Act of the General Assembly of Pennsylvania \* \* \* \* approved the 8th day of June, 1911, P. L. 710." Plaintiff attaches to and makes part of its statement, a copy of the certificate of registration. The certificate states the name of the corporation, the fact that it is chartered under the laws of West Virginia, that its principal office is at Bridgeport, Connecticut, and its principal office in Pennsylvania is in Philadelphia, and gives its location. It states its purpose to be the manufacture, sale and maintenance of automobiles and automobile trucks. The fourth paragraph of the certificate reads as follows:

"Its principal place of business in the Commonwealth of Pennsylvania, and the post-office address within the Commonwealth, to which the Secretary of the Commonwealth shall send by mail any process against it, served on him, is at No. 245-247 North Broad Street, Philadelphia, in the County of Philadelphia, in said Commonwealth. The company's agent in said place of business, to receive said process is : *S. deB. Keim*."

To this statement of claim, defendant filed the following demurrer:

And now, February 2, 1915, it appearing from the statement of claim filed in this case, that the cause of action of the plaintiff is based upon labor done and material furnished at its branch store or establishment and place of business in the City of Pittsburgh; that it also maintains and did maintain at the time the cause of action arose, a principal place of business in the City of Philadelphia, it is necessary in order for the plaintiff to maintain its action (defendant herein not waiving the non-compliance by the plaintiff of its failure to comply with the laws of the State of Pennsylvania in reference to the plaintiff, a foreign corporation doing business therein) that the plaintiff show in its statement of claim a full compliance with the laws of the State of Pennsylvania as a condition precedent to the maintainance of its cause of action, and having failed so to do, the defendant, by his counsel

George M. Hosack, demurs to the statement of claim filed in the above case and assigns the following causes of demurrer:

**FIRST.** The registration of the plaintiff under the provisions of the Act of June 8, 1911, P. L. 710, entitled "An act to regulate the doing of business in this Commonwealth by foreign corporation, the registration thereof and service of process thereon and providing punishment and penalties for the violations of its provisions and repealing previous legislation on the subject," is insufficient to permit the plaintiff to maintain its cause of action for the reason

(a) Said Act of June 8, 1911, P. L. 710, is unconstitutional and void, and

(b) It appearing that the plaintiff at the time the cause of action herein arose, maintained and now maintains its principal place of business in the City of Philadelphia, notwithstanding the registration under the provisions of the Act of June 8, 1911, P. L. 710, it is further required to register its additional place of business in the City of Pittsburgh under the provisions of the Act of April 22, 1874, P. L. 108, entitled "An act to prohibit foreign corporations from doing business in Pennsylvania, without having known place of business and authorized agents" for the reason that if the said Act of June 8, 1911, P. L. 710, be unconstitutional and void, it does not repeal the Act of April 22, 1874, P. L. 108, which requires the filing of proper registry in the office of the Secretary of the Commonwealth for each place of business.

**SECOND.** The statement of claim of the plaintiff does not show that prior to the commencement of dealings with the defendant or during the period which the transactions took place upon which the plaintiff bases its claim, that it duly registered in the office of the auditor general under the provisions of the nineteenth section of the Act of June 1, 1889, P. L. 420, entitled "A further supplement to an act entitled 'An act to provide revenue by taxation,' approved the seventh day of June, Anno Domini one thousand eight hundred and seventy-nine."

**THIRD.** The statement of claim of the plaintiff does not show that it complied with the provisions of the Act of May 8, 1901, P. L. 150, entitled "An act providing for the raising of revenue for State purposes, by imposing upon certain foreign corporations,



limited partnerships and joint-stock associations, a bonus of one-third of one per centum upon the capital actually employed in Pennsylvania, and requiring the filing of certain reports in the office of the auditor general."

FOURTH. That the said statement of claim is in other respects uncertain, informal and insufficient.

GEORGE M. HOSACK, *Attorney for Defendant.*

An additional cause for demurrer was filed at the time of argument, as follows:

And now, March 1, 1915, comes the defendant by his counsel, George M. Hosack, and assigns as additional cause for demurrer to the plaintiff's statement herein, the following:

The Act of June 8, 1911, P. L. 710, is unconstitutional and void for the reason that it is in violation of Article III, Section 3, of the Constitution of Pennsylvania, which provides as follows:

"No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in the title."

The questions thus raised have been fully argued, both orally and in carefully prepared briefs. Broadly stated the demurrer raises the question as to the legal right of plaintiff to maintain an action in view of the fact that it is a foreign corporation registered in this State pursuant to the Act of Assembly of June 8, 1911, and the further fact that it designated its principal place of business in Pennsylvania as No. 245-247 North Broad street, Philadelphia, in the County of Philadelphia, in said Commonwealth, and has not registered its branch office in Pittsburgh. The location of the principal place of business was subsequently changed to 2314-2322 Market street, Philadelphia, and a certificate filed with the Secretary of the Commonwealth. The Act of June 8, 1911, requires a foreign corporation, before doing any business in this State, to appoint the Secretary of the Commonwealth to be its true and lawful attorney and authorized agent, upon whom all lawful process in any action or proceeding against it may be served. The plaintiff filed the required power of attorney, the same being paragraph five of its certificate of registration filed July 26, 1911. It is contended that this registration is invalid and insufficient, (a) because the Act of June 8, 1911, is unconstitu-

tional; and (b) because the place of business in Pittsburgh is not registered. As to the constitutionality of the act, it is contended that it violates Article XVI, Section 5, which reads:

"No foreign corporation shall do business in this State without having one or more known places of business, and an authorized agent or agents in the same, upon whom process may be served."

Inasmuch as the certificate of registration showing the location of its principal office in this State was filed, and designates its place of business as the address to which the Secretary of the Commonwealth shall send by mail any process against it, served on him, we think it has met the constitutional requirement as to registration and appointment of an agent. To say that because it registered under an invalid Act of Assembly it cannot recover a debt, though the registration itself was intended to be in strict compliance with the Constitution and laws of the State, and was accepted by the State, calls for an interpretation of the Constitution and Act of Assembly that we are not ready to adopt. If this was an action against the plaintiff we do not think it would be permitted to say that it is not registered in this State, and we can not hold that it is registered when made defendant and not registered when it is plaintiff. We are aware that the service through the Secretary of the Commonwealth is not direct service upon the designated agent at the place of business, but we are not aware of any law that permits any person or corporation to agree that service upon a person designated may be lawfully made and will be treated as service upon the person or corporation authorizing it, and yet repudiate the service so made.

• There are many foreign corporations engaged in business in this State that have complied with the Act of 1874 and other acts prior to the Act of 1911. Was it the purpose of the legislature to close all the places of business of such corporations until they complied with the requirements of this last act? If it applied to them this was its inevitable legal effect, because each must appoint the Secretary of the Commonwealth its true and lawful attorney before doing any (more) business. However this may be; whatever the intention of the legislature or the effect of the legislation as respects this particular matter, we must take the act as we find

it and determine whether it is, as claimed by defendant's counsel, unconstitutional, or if constitutional, its effect.

Is the act as a whole unconstitutional, or is it unconstitutional in part and constitutional in part? It is contended that it violates Article III, Section 3, of the Constitution, in that it refers to more than one subject. We think the view contended for by counsel for defendant is too narrow. The act relates to but one general subject, viz:—foreign corporations. The legislature evidently regarded the act as treating of but one subject for the title refers to "legislation on the subject." Unless the act as a whole is unconstitutional its effect was to repeal the Act of 1874, for that act is singled out and specifically repealed by Section 5. If the title to the act applies to but one general subject, as we think it does, then regardless of the constitutionality or unconstitutionality of the first four sections of the act, the fifth section is effective to repeal the Act of 1874. Other acts on the subject are not repealed unless they are inconsistent with or are supplied by the Act of 1911. It will be noted that the second section is *mandatory* as respects the *appointment* of the Secretary of the Commonwealth as attorney and agent, but is *permissive* as to *service of process* upon him. It does not purport to provide an exclusive method for summoning a foreign corporation into court. The privilege accorded foreign corporations to do business in the State is of grace and not of right, and one of the conditions upon which this privilege is granted is that every corporation availing itself thereof shall appoint the Secretary of the Commonwealth attorney and agent for certain specified purposes.

The Constitution merely denies to foreign corporations the right to do business in the State without having one or more *known places of business* in the State and an authorized agent or agents in the same, upon whom process may be served. The agent is not required to be an officer, clerk or employee, nor is it necessary that his office be in the business house, *De La Vergne R. M. Co. v. Kolischer*, 214 Pa. 400-409. Article XVI, Section 5, of the Constitution, above quoted, does not purport to prescribe registration or any other method for giving information to the State or to the public of the fact that a foreign corporation desires to engage in business in the State. The Act of 1874 was passed to

give effect to this Constitutional inhibition, and continued in force until the Act of 1911 was approved. The Acts of June 1, 1889, P. L. 420, and May 8, 1901, P. L. 150, are revenue acts and do not make any change in the Act of 1874 in respect to the registration, designation of place of business, and appointment of agents required of foreign corporations. The Act of 1911 does not refer to revenue but does regulate the doing of business in this State by foreign corporations, and provides for registration and service of process. It is not inconsistent with, nor does it supply the provisions of the Acts of 1889 and 1901. The conclusion seems inevitable that it takes the place of the Act of 1874 and therefore is an act to carry into effect Article XVI, Section 5, of the Constitution. The question therefore arises: Does it meet the requirements of, make effective, this Constitutional inhibition? Does an Act of Assembly which provides for the filing of a power of attorney containing a statement showing the title and purpose of a foreign corporation, the location of its principal place of business in the State and the post-office address within the State to which the Secretary of the Commonwealth shall send by mail any process against it, meet the Constitutional requirements, and if it does not, what is the status of foreign corporations that have come into the State since the approval of said act and pursuant to its provisions? And it may be asked also: What is the status of foreign corporations that are in the State pursuant to the provisions of the Act of 1874? That the act was intended to apply to all can not be doubted. The objection to the act on the ground that the title is defective, embraces different subjects, seems to be answered by Mr. Justice Mitchell in *Sugar Notch Borough*, 192 Pa. 349-353, "Where a general title, sufficient to cover all the provisions of an act, is followed by specifications of the particular branches of the subject with which it proposes to deal, the scope of the act is not limited nor the validity of the title impaired except as to such portions of the general subject as legislators and others would naturally and reasonably be led by the qualifying words to suppose would not be affected by the act."

Respecting the rule by which courts are guided in passing upon the constitutionality of an Act of Assembly we quote from *Commonwealth v. Moir*, 199 Pa. 534-543:

"Nothing but a clear violation of the Constitution, a clear usurpation of power prohibited will justify the judicial department in pronouncing an act of the legislative department unconstitutional and void."

It has been said repeatedly that the purpose of the Constitutional provision and Acts of Assembly prescribing the terms and conditions upon which foreign corporations may do business in the State is, to subject said corporations to legal process from our courts—to bring them within the taxing power of the State, etc. If the Act of 1911 accomplishes this purpose, then we have but two questions left for consideration: First. Is registration under said act a sufficient compliance with the Constitutional provisions requiring the corporation to have an authorized agent or agents, where it appears that before beginning business in this State it filed a certificate designating the location of its principal office in Philadelphia, and naming an agent in said place of business to receive process, etc., and subsequently, but before the debt in suit was contracted, located a branch store or establishment in Pittsburgh but did not designate it as a place to which process might be sent by the Secretary of the Commonwealth? Second. Does failure to register the place of business in Pittsburgh, bar an action to recover a debt alleged to be due for work done and materials furnished at the place of business in Pittsburgh? And we may add as a third question, thereby widening the scope of the inquiry,—Does the failure to register the Pittsburgh place of business bar recovery in any action at law whether the debt was contracted in Philadelphia or Pittsburgh?

In *Dunbar Co. v. Penna. R. R. Co.*, 237 Pa. 192, the court says:

"The primary purpose of the Constitutional requirement is to bring foreign corporations doing business in our State within the reach of legal process: *Construction Co. v. Passenger Ry. Co.*, 204 Pa. 22. In the case at bar this primary purpose was served by registering an agent and establishing a place of business. Neither the Constitution nor the Act of 1874 requires more than one registered agent and one office or place of business unless the foreign corporation has established two or more offices or places of business in the State, in which event there must be a registered agent in each office or place of business established."

Whether the Court intended to state the Constitutional or merely the statutory requirement, we do not undertake to decide; that is, we do not undertake to say that the court was defining the effect of the Constitutional provision standing alone, or the effect of the statute enacted to carry it into effect. If the fair and reasonable interpretation of the Constitution is, that a foreign corporation must have an agent at each known place of business in the State, upon whom process may be served, the plaintiff in this action has failed to comply with this requirement. Assuming this to be what the Constitution requires, we are then forced to the conclusion that a foreign corporation must still have an agent at each place of business, regardless of the repeal of the Act of 1874 and the passage of the Act of 1911. This brings us back to the question,—Does a foreign corporation that has complied with all the requirements of the Constitution upon coming into the State, forfeit its right to sue for a debt due it, because of failure to designate an agent upon whom process may be served at an additional place of business which it establishes subsequently, even though it has agreed that the Secretary of the Commonwealth shall be its attorney on whom process may be served? In the case at bar the plaintiff avers that it is a foreign corporation and that it registered as required by the Act of Assembly of June 8, 1911, P. L. 710, and attaches to its statement and makes part thereof a copy of the certificate of registration. This gives it a *prima facie* right to do business in the State and to maintain this suit. That it may be subject to the penalties specified in section four of the Act of 1911 or those imposed by other statutes does not bar it from maintaining a civil suit to recover money alleged to be due. To hold, as we feel bound to do, that the Act of 1874 is repealed, and yet that the Act of 1911 does not authorize a foreign corporation complying with its provisions to do business in this State, would cause such confusion, would be fraught with such injustice, that unless irresistably forced to such a conclusion, we must adhere to what we believe to be a reasonable interpretation of the Constitution, and construction of the statute. The questions raised are important and should be settled promptly. It is in the power of an inferior court to declare an Act of Assembly

unconstitutional, but that power should not be exercised except in cases where there is no room for doubt.

The demurrer is overruled. Defendant is allowed 15 days from the date of service of notice, in which to file his affidavit of defense.

Note:—Cf. *Locomobile Co., etc., v. Malone*, ante p. 439.

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WETHERILL, ET AL. v. ARASAPHA MANUFACTURING CO.

*Corporations—Power of directors—Redemption of preferred stock—Equity practice.*

The board of directors of a corporation formed under the Act of 1874 and its supplements has no power to close its business and liquidate the assets of the corporation.

A decree compelling the retirement of preferred stock will not be made unless it is made to appear affirmatively that no injustice will thereby be done to the existing rights of other stockholders or creditors of the company.

A motion to dismiss a bill in equity after the plaintiff closes his evidence will be treated as an election by the defendant not to offer evidence. It cannot be compared to a non-suit at law.

Where the issue has been made up before other parties were permitted to intervene such parties cannot raise any new issues.

Hearing on bill, answer, replication and proofs. C. P. Delaware Co. No. 269, September Term, 1913.

*James L. Rankin and William I. Shaffer*, for plaintiffs.

*William B. Harvey and Joseph H. Hinkson*, for defendants.

THE COURT, Feb. 20, 1915.

The bill of the plaintiffs purports to be a stockholders' bill. It comes up on Bill, Answer, Replication and Proofs. At the conclusion of plaintiffs' proofs, the defendants moved to dismiss the bill. We treat this as an election not to offer any evidence, which brings the case to be considered as having been tried. A motion to dismiss cannot be assimilated to a motion for a non-suit at law. A non-suit permits the plaintiff to sue again, while an equity suits ends with a decree, which is final.

We pass the question whether this is in fact a stock-holders' bill, seeing that tender to become parties is made only to the holders of a part of the capital stock, to wit, the holders of preferred stock.

The answers of the defendants raise no question of jurisdiction in equity. The answers of the intervening defendants do raise this question, but the issue was already made up by bills, answers and replication, when the intervening defendants were permitted to intervene. An intervening party must abide by the pleadings as he finds them at the time of the entry. He cannot be heard to raise any new issue; Am. & Eng. Enc. of Law, 2nd Ed., Vol. 17, p. 185.

We therefore pass the question of jurisdiction and proceed to find the following conclusions of fact and law:

#### FACTS.

1. This bill is filed by the plaintiffs for and on behalf of themselves as holders of preferred stock of the Arasapha Manufacturing Company, and for and on behalf of any other holders of preferred stock who may wish to become parties plaintiff herein, upon contributing their proportionate share of the costs and expenses thereof.

2. The said Arasapha Manufacturing Company, formerly called the Jordan Manufacturing Company is a corporation of the Commonwealth of Pennsylvania, incorporated under the general corporation law of April 29, 1874, P. L. 73, and its supplements and engaged in the business of the manufacturing of textile fabrics, its principal place of business being in the City of Chester, Delaware County, Pa.

3. William S. Blakeley, one of the defendants is the president of said corporation.

4. Richard Wetherill, one of the defendants, is the treasurer of said corporation.

5. The plaintiffs are holders of some of the preferred shares of stock of said corporation, authorized to be issued in pursuance of a resolution passed at a stockholders' meeting held on May 24, 1905, as follows:

"Resolved that the increase of capital stock of sixty thousand



dollars, authorized by this meeting be issued by the Board of Directors of this company as preferred stock, to be preferred to the common stock, as being entitled to be paid in full at the rate of one hundred dollars (\$100.00) per share out of the property of the company, before any distribution shall be made to the holders of common stock; and further preferred in being entitled to receive dividends out of the net earnings of the company, to the amount of seven per cent. per annum, in equal quarterly payments before any dividend on common stock cumulating until paid, and with the reservation that the Board of Directors shall have the right to call in, retire and cancel any or all of the said preferred stock at any time by paying to the holders thereof one hundred and five dollars and all accrued dividends, for every share of one hundred dollars and that for the purpose of protecting the said issue of preferred stock, this company now resolves that no mortgage or other incumbrance shall be placed on the real estate, plant of the company, until after the said preferred stock shall have been retired and cancelled."

6. The number of shares of said preferred stock held by the plaintiffs respectively at the date of the filing of this bill is as follows:

Robert Wetherill, 200 shares; Henry Von H. Stoever, 50 shares; Alexander W. Meigs, 50 shares; William Wilson, 10 shares; Garetta Roach Forbes, 8 shares; Garetta Roach Forbes, Guardian of Sarah Schuyler Long, 4 shares; Garetta Roach Forbes, Guardian of Frederick Farwell Long, 4 shares; Garetta Roach Forbes, Guardian of John B. Roach Long, 4 shares.

7. The Board of Directors of said corporation adopted the following resolution on October 3, 1912:

"The following motion was offered by Mr. C. L. Gilliland, second by Mr. F. H. Galey. 'The president of this company is hereby authorized and directed to close down this plant as quickly as practicable and to liquidate the assets of the company, and with the treasurer to pay indebtedness. He will with the treasurer call in and retire and cancel such preferred stock of this company as can be purchased at par and accrued interest; provided, however, there is no other outstanding indebtedness in excess of two thousand dollars. Payment of such purchases to be in cash.'"

"This offer to be made to all stockholders of record on the books of the company as holders of preferred stock."

8. The indebtedness of the corporation at the time of the filing of this bill was less than two thousand dollars.

9. The condition of the corporation at the time of the filing of this bill was as shown by the next succeeding treasurer's report on December 31, 1913, as follows:

ASSETS.	LIABILITIES.
Real estate .....\$108,519.94	Capital stock preferred ..... \$60,000.00
Machinery ..... 212,198.98	Capital stock common ..... 300,000.00
Office fixtures .... 927.62	Unclaimed wages . 278.33
Inventories ..... 25,133.80	Sundry accounts .. 1,416.93
Cash ..... 3,690.50	<hr/> \$361,695.26
Petty cash ..... 28.45	
Bills receivable ... 5,000.00	
Sundry accounts .. 975.78	
Profit and loss .... 5,222.19	
<hr/> \$361,695.26	

9. The plaintiffs treated the resolution of the Board of Directors of October 3, 1912, as an offer to cancel their preferred stock at par and accrued interest, and accepted the offer, but no formal offer was made to them by the Board of Directors or by its president and treasurer.

10. Plaintiffs have demanded of William S. Blakeley as president and of Richard Wetherill as treasurer to cancel their preferred stock and pay to them the amount owing to them which they have refused to do.

#### DISCUSSION.

The Board of Directors of a corporation under the corporation Act of April 29, 1874, and its amendment of May 14, 1891, P. L. 60, is constituted to manage its business. The directors have no such power as they attempted to exercise under the resolution of October 3, 1912, "to close down this plant as quickly as possible and to liquidate the assets of the company." Directors cannot transfer property of the corporation which is essential to the continuance of the corporate business and a fortiori they have no

power to wind up the affairs of the corporation; Taylor on Corporations, 2nd Ed., sections 229, 230; Balliet v. Brown, 103 Pa., 546; Temperance Association v. Friendly Society, 187 Pa. 38; 6 L. R. A., note p. 678. But this board of directors has had the power conferred upon it by the stockholders' resolution of May 24, 1905, "to call in, retire and cancel any or all of the said preferred stock at any time, by paying to the holders thereof one hundred and five dollars and all accrued dividends for every share of one hundred dollars." To do this in this case requires that they shall first quit business and liquidate the assets of the company, which they have no power to do, and which a glance at the balance sheets shows would have to be done to provide the cash to retire the preferred stock.

The proceeding contemplated in this case in a reduction of capital stock. If this were done under the Act of 1874, it would have to be done in the method prescribed therein. But a reduction of preferred stock may be affected under the Act of April 28, 1873, P. L. 79, Stewart's Purdon, Vol. 1, p. 804, pl. 99, which is "and the company shall have the right to redeem its preferred stock upon such terms as may be provided in the issue thereof; and it may be appropriate \* \* \* for the redemption of the principal thereof \* \* \* the proceeds of any portions of its assets or property: Provided that no injustice shall thereby be done to the existing rights of other stockholders or creditors of the company."

In order to warrant a decree for the retirement of preferred stock it should be made to affirmatively appear that no injustice will thereby be done to the other stockholders and creditors, because this is a necessary concomitant to the exercise of the power.

We, therefore, find the following:

#### CONCLUSIONS OF LAW.

1. The board of directors of a corporation formed under the Act of April 29, 1874, P. L. 78, and its amendment of May 14, 1891, P. L. 60, does not have the power to close the plant, and liquidate the assets of the corporation.

2. A decree compelling the retirement of preferred stock will not be made unless it is made to affirmatively appear that no in-

justice shall thereby be done to the existing rights of other stockholders or creditors of the company.

3. The bill of the plaintiffs should be dismissed with costs to the defendants.

Opinion by Broomall, J.

And we make the following:

DECREE NISI.

And now, February 20, 1915, it is ordered, adjudged and decreed that the Bill of the plaintiffs be dismissed with costs to the defendants.

## PUBLIC SERVICE COMMISSION

TWENTY-SEVENTH WARD PROGRESSIVE CLUB *v.* PITTSBURGH  
RWYS. CO.

### *Street railways—Transfers—Discrimination.*

It is not discrimination to refuse the granting of transfers from one line of street railway to another where it is shown that they proceed over practically the same route to terminal points a few blocks apart and that the granting of transfers in all similar cases on the system would delay traffic.

COMPLAINT DOCKET No. 350.

Report and Order of the Commission.

COMMISSIONER BRECHT :

In the matter of the discrimination alleged to exist in this case, it was shown by the testimony taken at the hearing that the conditions and circumstances underlying the service on the two lines in question, the Brighton Road and the California avenue lines, differ very materially in scope and character, that both lines proceeded practically over the same route and reached the downtown business district at terminal points only a few blocks apart, that the issuance of transfers on the Brighton Road line for the California avenue and Federal street route, and vice versa, from the places designated in the complaint, would compel the railways company to issue transfers upon other similar routes throughout the city, that such a policy would destroy the entire system of transfers now established for the city and would tend to overcrowd or congest the main arteries of travel to such an extent that the company could not take care of the traffic, that the line for which complainant is demanding transfers into town is a long suburban route on which the cars are already carrying more or less their full capacity, that the length of the run upon the two lines from their point of intersection to the down-town district is substantially the same, that the cars on both lines run directly to the heart of the business section of the city, reaching their respective destinations only a few blocks apart, and making the trip within four or five minutes of the same schedule time, and

finally that the service on the line now traveled by complaint appears to be entirely satisfactory in all other respects to the people directly affected. In view of the foregoing facts an order will be issued to dismiss the complaint without recommendation.

**ORDER.**

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

Now, to wit, May 7, 1915, it is ordered: That the complaint in this proceeding be and the same is hereby dismissed.

By the Commission,  
SAM'L. W. PENNYPACKER, *Chairman.*

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**IN RE GRADE CROSSINGS OVER COCHECTON AND GREAT BEND  
TURNPIKE, ETC.**

*Jurisdiction of Commission—Damages to adjacent property.*

Under Article III, Section 5, and Article V, Section 12, of the Public Service Company Law, the Commission has exclusive jurisdiction in the matter of abolition and construction of all crossings of public highways over the tracks of railroads, and has power to consider and determine the damages sustained by owners of adjacent property, but it has no power to determine damages for appropriation of land by a railroad company for railroad purposes.

APPLICATION DOCKET No. 321, 1914.

Report and Order of the Commission.

*J. H. Oliver and Frederic W. Fleitz, for applicant.*

*H. C. Reynolds and E. R. W. Searle, for protestants.*

**COMMISSIONER WALLACE:**

The application in this case is for the approval of the abolition

of two crossings at grade of the tracks of the Delaware, Lackawanna and Western Railroad Company, in the Township of Great Bend, Susquehanna County; one at a point in said township where the Cochection and Great Bend Turnpike, a state highway called the Lower Road, crosses the tracks of the said company, and known as McKinney Crossing; the other at a point in said township where the said turnpike, called the Upper Road, crosses the tracks of the said railroad company, known as Florence Crossing; and also for the construction of a crossing above grade at a point in said township, on the lands formerly of the J. E. Johnson Estate, about 1,000 feet south of the Florence Crossing. A new public highway is to be laid out to connect the Upper Road and Lower Road with this above grade crossing.

Hearings were held and full investigation had as to the dangerous condition of these grade crossings and the necessity for their abolition, which necessity was practically admitted by all the parties, and the Commission on January 7, 1915, adopted and approved plans and specifications for the elimination of the said grade crossings. The parties in interest being unable to agree as to the amount of damages which adjacent property owners would sustain by reason of the said abolition, a further hearing was held in Scranton on January 15, 1915, on the question of the damages due to adjacent property owners. At this hearing testimony was taken which is part of the record and full opportunity granted to all persons in interest or affected by the abolition of the above crossings to present their claims.

The protests filed on behalf of certain property owners and the supervisors of Great Bend Township allege that there is no power in the Commission to determine the case before us, because a portion of a public highway is vacated. We think that the provisions of Section 5, Article III, and Section 12, Article V, of the Public Service Company Law, give the Commission exclusive jurisdiction in the matter of the abolition and construction of all crossings of public highways over the tracks of railroad companies, and also that adjacent property owners are fully and legally protected, in securing just and adequate damages which they may sustain by reason of the abolition or construction of any such crossings.

We do not think that the Commission has the power to, nor

should go into the question of the legality of the condemnation proceedings instituted by the railroad company to acquire the lands of James A. Florence, one of the protestants. There is nothing in the act which gives the Commission power to determine damages caused by reason of appropriation of land for railroad purposes, but any damages sustained by an adjacent property owner by reason of the abolition of a grade crossing must be considered and determined by the Commission.

The laying out of the new public highway from the Upper Road and the Lower Road to connect with the overhead bridge must be done by the railroad company, as the land upon which the highway will be located is owned by the said company, which company must by proper action set over the highway to the Commonwealth of Pennsylvania, or a municipality having jurisdiction.

The Commission is of the opinion and finds and determines, after careful investigation of the testimony and record, that the abolition of the grade crossings aforesaid, in conformity with the plans and specifications approved January 7, 1915, is necessary and proper for the accommodation, convenience and safety of the public, and also finds and determines that the following property owners have sustained damages in the amounts set opposite their names:

J. C. Florence . . . . .	\$500.00	E. H. B. Rossa . . . . .	\$300.00
Mrs. P. R. Barriger .	250.00	J. A. Florence . . . . .	500.00
Miles Bennett . . . . .	200.00	C. R. McKinney . . .	4,500.00
C. A. Trowbridge . .	200.00		

The Commission also finds and determines that the said Delaware, Lackawanna and Western Railroad Company shall pay all the costs and expenses incident to the abolition of said grade crossings, and the construction of the overhead crossing, including the amount of damages herein awarded to the adjacent property, and also that the said company shall keep in repair, or make provision with the necessary authorities for payment for keeping and maintaining in repair, the Lower Road, from the McKinney crossing to the point where the new public highway connects with said road, and also the portion of the Upper Road from the



Florence crossing to a point where the new public highway connects with said road.

An order will, therefore, be entered approving the application in this case, and directing that a Certificate of Public Convenience be issued in accordance with this finding and determination.

**ORDER.**

This case being at issue upon petition and protests on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

Now, to wit, April 9, 1915, it is ordered: That a Certificate of Public Convenience be issued in accordance with and more fully and at large set out in the said report hereto attached; that the Delaware, Lackawanna and Western Railroad Company shall pay, as compensation for damages caused to their property by reason of the abolition of the crossings referred to in said report, to the following adjacent property owners the amounts set opposite their names [as set forth in the foregoing report], and also that the said Delaware, Lackawanna and Western Railroad Company shall pay all the costs and expenses incident to the abolition of the said grade crossings and the construction of the overhead crossing, that the said railroad company shall keep in repair, or make provisions with the necessary authorities for payment for keeping and maintaining in repair, the Lower Road from the McKinney crossing to the point where the new highway connects with the said road, and the portion of the Upper Road from the Florence crossing to a point where the new highway connects with said road.

By the Commission,

SAMUEL W. PENNYPACKER, *Chairman.*

## APPLICATION OF SUPERVISORS OF CONCORD TOWNSHIP.

*Approval of contracts for abolition of crossings.*

The approval of a contract, under Article III, Section 11 of the Public Service Company Law, providing for the abolition of certain grade crossings, and the approval of the construction of said crossings under Article V, Section 12, of said law, should be considered separately. Such a contract will be approved where the interests of the public are properly provided for and Rule 36 of the Commission's Rules of Practice has been complied with. The approval of the construction of the crossings will be considered in a separate proceeding.

## MUNICIPAL CONTRACT DOCKET No. 343, 1914.

## Report and Order of the Commission.

*G. T. Kincaid and C. L. Baker*, for applicant.

*C. H. Bergner, F. M. McClintock, Peake & Smith, and C. E. B. Rodgers*, for protestants.

## COMMISSIONER WALLACE:

The Pennsylvania Railroad Company owns and operates a line of railroad from the City of Corry to the City of Erie, a portion of which line, namely, that from Corry to Lovells Station, is located in Concord Township, Erie County, and running parallel with this portion of the said line of railroad is the line of the Erie Railroad Company.

About the first of June, 1913, the Pennsylvania Railroad Company, as lessee of the Western New York and Pennsylvania Railroad Company, began to reconstruct its line of railway from Corry to Spartansburg, Crawford County. This reconstructed line runs parallel with and between the lines of the Erie and Pennsylvania Railroads from Corry to a point near Lovells Station, and thence, passing under the tracks of the Erie Railroad, in a southwesterly direction through the Township of Concord into and beyond Crawford County, crossing eight public highways in said township, to wit: Reedy Road, Higley Road, Lovell Road, Corry-Elgin Road, McGray or Burrow's Road, Ormsby Road, Wade Farm Road, and County Line Road. On August 1, 1913, the Pennsylvania Railroad Company commenced negotiations with the

supervisors of Concord Township for the purpose of coming to an agreement, if possible, with respect to these eight road crossings, and as a result of the negotiations, on August 29, 1914, said parties made and entered into the agreement which the Commission is now asked to approve.

This contract provides that the supervisors of Concord Township shall, as soon as it can conveniently do so, start proceedings to close, or legally vacate or abolish the grade crossings on the following public highways or portions thereof:

1. Six hundred linear feet of the Reedy Road and 275 linear feet of said road, across the right of way of the Erie and Pennsylvania Railroads.

2. Two thousand linear feet of the Higley Road south of the line of the Erie Railroad; 400 linear feet of said road north of the line of the Pennsylvania Railroad and about 240 feet across the right of way of the said railroads.

3. Three hundred linear feet of the McGray or Burrow's Road, west of the line of the Western New York and Pennsylvania Railroad; 2,200 linear feet east of the line of said railroad, and 200 linear feet across the right of way of the said railroad.

4. That portion of the County Line Road lying between the right of way of the Western New York and Pennsylvania Railroad.

As a consideration for the closing of these roads or abolition of the existing grade crossings thereon, the railroad company agrees to pay the township \$13,300, and, in the event that the township authorities are prevented from vacating one or more of the said roads, a proportionate amount of this sum is agreed to be paid. The other provisions of the contract are the erection and maintenance of safety gates at the Lovells Station road crossing, the granting of private crossings on the McGray and County Line Roads, the change and abandonment of a portion of the Corry-Elgin Road west of Lovells Station, and the construction of an under-grade crossing. The construction of an overhead crossing on the Ormsby Road, an under-grade crossing of the Wade Road and the laying out of a new road to connect the County Line Road with an under-grade crossing west of the existing grade crossings of said County Line Road. There is a fur-

ther provision that the railroad company will keep, save harmless and protect the township from any claim, cost, charge or expense on account of the vacating or relocating of any of the public highways mentioned, and to pay to the attorney for the township a stipulated fee for services in having the said highway vacated and relocated.

It is evident that, under the terms of this contract, the abolition of the grade crossings and the vacation of the public highways mentioned are contingent upon the proper legal action necessary to secure such abolition or vacation, and the railroad company cannot close the crossings until they have been changed, altered or abolished in the manner prescribed by law.

Under the Act of July 26, 1913 (Section 12, Article V), this Commission has exclusive jurisdiction upon its own motion or upon complaint in the matter of the construction, alteration, relocation or abolition of grade crossings, except such grade crossings as were in process of abolition at the time of the passage of the act under agreement or contract with a municipality. There is no claim or contention in this case that the crossings named do not require the approval of the Commission. The subject before the Commission in this case is the approval of a contract between a municipality and a public service company, under Section 11, Article III, of the said act of assembly, and the question of the alteration, relocation or abolition of certain grade crossings in Concord Township does not enter into and should not be considered by the Commission in this proceeding, but, in view of the fact that most of the testimony taken and objections made were upon the question of the vacation and abolition of the crossings of Reedy, Higley, and McGray Roads, the Commission will, upon its own motion, in another report, make a finding, determination and order with respect to all the crossings mentioned in the contract.

Eliminating, therefore, from consideration everything in the testimony and protests which bears directly upon the question of the necessity for the alteration, abolition or relocation of the said eight crossings, the only objection to the approval of this contract which remains for consideration is that the petition does not conform to the requirements of the Rules of Practice of the Com-

mission. Considering this petition only as a petition for the approval of a municipal contract under Rule 36, we do not find any provision or requirement of said rule which has not been complied with. The contract fully and completely protects the Township of Concord, for not only no cost or expense is placed upon it, but a large sum of money is to be paid to it, which of necessity will be a great benefit to every citizen in that township in the way either of reduced taxation or of added improvements. The Commission is of the opinion that this contract should be approved and an order will, therefore, be entered directing that a Certificate of Public Convenience be issued evidencing the Commission's approval of the contract dated August 29, 1914, between the supervisors of Concord Township and the Pennsylvania Railroad Company, lessee.

#### ORDER.

This case being at issue upon petition and protest on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

Now, to wit, April 9, 1915, it is ordered: That a Certificate of Public Convenience be issued approving the contract dated August 29, 1914, by and between the Township of Concord, Erie County, and the Pennsylvania Railroad Company, lessee of the Western New York and Pennsylvania Railroad Company.

By the Commission,

SAMUEL W. PENNYPACKER, *Chairman.*

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#### IN RE GRADE CROSSINGS IN CONCORD TOWNSHIP.

*Approval of construction of crossings.*

APPLICATION DOCKET No. 91, 1915.

Report and Order of the Commission.

This case arises out of the approval of the contract between the supervisors of Concord Township and the Pennsylvania Railroad Company,

Lessee, and is on the Commission's own motion. The necessity for the changes involved in the abolition of the crossings is fully shown by the evidence.

*Held:* That Certificates of Public Convenience should be issued evidencing the Commission's approval of the various crossings specified, and that the railroad company shall pay the amount of the compensation for damages to adjacent property owners as found and determined by the Commission in its order and all costs of construction.

COMMISSIONER WALLACE:

This case comes before the Commission on its own motion. At the hearings held in re-application of the Supervisors of Concord Township, Erie County, for the approval of a contract between said township and the Pennsylvania Railroad Company, Lessee, No. 343—1914, Municipal Contract Docket [see preceding case] testimony was taken and investigation had in the matter of the alteration, relocation, abolition or protection of eight crossings of public highways in Concord Township, Erie County, across the tracks of the Pennsylvania Railroad, the Erie Railroad, and the Western New York and Pennsylvania Railroad. This testimony and record was only considered incidentally by the Commission in the application for the approval of a municipal contract, but will be now taken and treated as the testimony and record in this proceeding.

The Pennsylvania Railroad Company, as lessee of the Western New York and Pennsylvania Railroad Company, began the reconstruction of its line of railroad located in Concord Township, in the month of June, 1913. This line runs parallel with and between the lines of railway of the Erie Railroad and the Renovo Division of the Pennsylvania Railroad from the City of Corry, to Lovells Station, and from thence, passing under the tracks of the Erie Railroad, runs in a southwesterly direction to the Crawford County line, crossing eight public highways in the said township, which crossings will be now considered in order, westwardly from Corry City.

About 1,300 feet west of the western line of the City of Corry is a public highway known as the Reedy Road, which road is crossed at grade by two tracks of the Erie Railroad, one track of the Western New York and Pennsylvania Railroad and one track

of the Pennsylvania Railroad. With respect to this crossing the testimony shows that it is a dangerous crossing; that the said road is little traveled; that for a period of ten days from November 6th to 16th, during which a record was kept, only two persons used the said crossing; that seventy-six citizens of the said Concord Township petitioned the supervisors thereof to abolish this crossing; that the railroad company has secured agreements with all adjacent property owners covering the compensation for damages sustained through the abolition of the crossing, with the exception of Mrs. Thomas Reedy; and that the abolition of the crossing would add greatly to the safety of the public. The Commission, after careful consideration of the testimony and record with respect to the abolition of the said Reedy crossing and the amount of damages to be awarded to Mrs. Reedy, is of the opinion and finds and determines that the said crossings should be abolished and that the Pennsylvania Railroad Company, Lessee, shall pay to Mrs. Thomas Reedy \$1,000 as compensation for damages caused to her property by reason of the abolition of the said crossing.

A public highway known as the Higley Road is located about 3,000 feet west of the Reedy Road, and is crossed at grade by the same railroad lines as the Reedy Road. It is admitted that this is a very dangerous crossing and the testimony shows that it cannot now be kept open as a grade crossing by reason of the fact that the tracks of the reconstructed line of the Western New York and Pennsylvania Railroad are twelve feet higher than the tracks of the Erie and Pennsylvania Railroads. The only way to maintain any crossing whatever at this point is by carrying the highway over all three of the railroads, and this would necessitate the construction of a long viaduct which would cost between \$30,000 and \$40,000. On the question of the necessity for any crossing at this place, the testimony is contradictory. In favor of the closing of the crossing is a petition signed by 83 citizens of Concord Township, and in opposition, 34 witnesses, most of whom are residents of Wayne Township, testify that the crossing was necessary. If the crossing were entirely abolished there would be a stretch of about 2.5 miles of railroad without a crossing, the nearest crossing on the east being Washington street, in the City of Corry, distant about a mile from Higley crossing, and the nearest crossing on

the west being Lovells Station, distant about one and one-fourth miles from said crossing.

The Higley Road is not an extensively traveled highway. The record shows that for a period of ten days only twenty-two people crossed the tracks of the railroad at this point and in view of the fact that this road is so little traveled the Commission does not feel justified in ordering the railroad company to construct an overhead crossing at this point. It is true that the Commission has the power to apportion the cost of the construction of a viaduct between the railroad companies and the township, but it appears that in this case the Commission would hardly be justified in placing any large amount of the cost upon the township; and to require the railroad companies to expend the sum of \$40,000 for an improvement which would be used by so few people does not seem to be warranted under all the evidence in the case. No compensation for damages to adjacent property owners by reason of the said abolition is found or determined by the Commission, because the Pennsylvania Railroad Company has agreed with all property owners who will be affected in any way by the abolition as to the amount of damages they will sustain.

The Commission is, therefore, of the opinion that the best solution and one which would do justice to all, is to abolish the crossing known as Higley crossing, and an order will be so entered.

The next public highway crossed by the tracks of the said railroad companies is the Lovell Road at Lovells Station. This is a grade crossing which, from all the evidence in the case, cannot be changed by means of an above or below grade crossing, and it is the opinion of the Commission that safety gates should be established at this crossing, with a watchman on duty for twenty-four hours each day for the operation of said gates and the protection of the crossing and an order will accordingly be entered directing the railroad companies to install and maintain safety gates and a watchman at said crossing.

The reconstructed line of the Western New York and Pennsylvania Railroad Company will cross the public highway known as the Corry-Elgin Road by means of an under-grade bridge and thus avoid a grade crossing at or near the point of crossing. No objection has been made on the part of any person to this con-



struction and accordingly the same is hereby approved and an order will be entered approving said under-grade crossing.

The next public highway to be considered is that known as the McGray or Burrow's Road, which is crossed by the tracks of the Western New York and Pennsylvania Railroad at grade. Testimony with respect to this crossing shows that the road is very little traveled; that the crossing is a very dangerous one; that in order to avoid a grade crossing it would be necessary to construct an underpass costing about \$25,000. The evidence with respect to this crossing does not warrant ordering the construction of an underpass and placing the cost of construction thereof either upon the railroad companies or upon the township. The railroad company has secured agreements and releases for all damages to adjacent property owners caused by the abolition of this crossing, with the exception of Thomas B. McGray. After a careful consideration of all the testimony as to the necessity of the abolition of the crossing and the amount of damages due to said McGray, the Commission is of the opinion and finds and determines that the crossing at grade of the tracks of the railroad company over the McGray or Burrow's Road should be abolished and that the said railroad company shall pay to Thomas B. McGray the sum of \$500 for damages incident to said abolition.

The remaining roads which are crossed by the reconstructed line of the Western New York and Pennsylvania Railroad are the Ormsby Road, the Wade Farm Road, and the County Line Road. The Ormsby Road will be crossed by means of an overhead road bridge, to which no objection has been made, and as the safety of the public will be increased by its construction, the Commission will issue an order approving the same. The Wade Farm Road will be crossed by an under-grade bridge and as no objection has been filed to this and the safety of the public will be greatly increased by this construction, an order will be issued approving the same. The County Line Road is crossed at grade north of the tracks of the railroad company and a new public road will be laid out to connect the County Line Road with a public highway which crosses the tracks of the railroad company by an under-grade bridge, and by this means will render unnecessary a grade crossing of the County Line Road. No objection has been made

to the abolition of this grade crossing, and the railroad company has entered into agreements and secured releases for all damages which may be sustained by adjacent property owners on account of the abolition of said crossing. The safety of the public will be greatly increased by means of this arrangement and an order will, therefore, be entered abolishing the said grade crossing over the County Line Road.

ORDER.

This case being at issue on the Commission's own motion, and having been duly heard and a full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

Now, to wit, April 9, 1915, it is ordered: That a Certificate of Public Convenience be issued approving the abolition and construction of the crossings more fully and at large set out and in accordance with the report of the Commission hereto attached; that the Pennsylvania Railroad Company, Lessee, shall pay to Mrs. Thomas Reedy one thousand dollars (\$1,000.00), as compensation for damages caused to her property by reason of the abolition of the Reedy crossing; that the Pennsylvania Railroad Company, Lessee, shall pay to Thomas B. McGray five hundred dollars (\$500.00), as compensation for damages caused to his property by reason of the abolition of the McGray crossing; that the Pennsylvania Railroad Company and the Pennsylvania Railroad Company, lessee of the Western New York and Pennsylvania Railroad Company, and the Erie Railroad Company, shall install and maintain safety gates at the grade crossing of the Lovell Road at Lovells Station, and maintain a watchman on duty for twenty-four hours each day for the operation of the said safety gates and the protection of the crossing.

By the Commission,  
SAMUEL W. PENNYPACKER, *Chairman.*

**CRUCIBLE STEEL CO. OF AMERICA v. PENNA. RAILROAD COMPANY.*****Demurrage—Inter-plant movements—Scope of general demurrage rules—Discrimination.***

1. Where inter-plant movements of cars are made for an industry by its own power under tariffs which contain demurrage regulations allowing forty-eight hours free time for loading and unloading, such free time must be allowed. But where the tariffs for such inter-plant movements do not contain such demurrage regulations no free time can be claimed under the provisions of the general demurrage rules. These rules apply only to the movement of cars in the general transportation service of the carrier, on in- and out-bound carloads when placed on the interchange tracks by or for the carrier. The inter-plant service of an industry is not a part of the transportation service of the carrier but is wholly distinct.

2. The charging of a different rate for inter-plant movements of cars made by the carrier's power and those made by individual power, is not discriminatory. The two movements differ materially in character.

Note: See *Crucible Steel Co. v. P. R. R. Co.*, 1 P. C. R., pp. 49-55.

**COMPLAINT DOCKET No. 268.****Report and Order of the Commission.**

*W. F. Morris, Jr., and Jas. A. Stranahan*, for complainant.

*Frederick L. Ballard*, for respondent.

**COMMISSIONER BRECHT:**

Under date of July 15, 1913, the Crucible Steel Company of America filed a complaint before this Commission against respondent, alleging that the railroad company in charging complainant demurrage was not allowing it the amount of free time provided under the tariff then published and in effect. The tariff then on file contained the following paragraph upon demurrage and car service regulations:

"Under the tariff, when the freight to be loaded by consignor or unloaded by consignee, \$1.00 per car per day or fraction thereof, for delay beyond forty-eight hours in loading or unloading, will be added to the rates named herein and constitute a part of the total charges to be collected by the carrier on the property; except that Car Demurrage Bureau or local regulations at shipping point or destination lawfully

on file with the Interstate Commerce Commission shall prevail and govern at said point."

In an opinion on December 17, 1913, this Commission issued the following order in the case:

"In accordance with the views expressed in the opinion filed herewith, this Commission hereby determines that the complainant, Crucible Steel Company of America, since Rate Orders R. No. 977 and R. No. 982 of the respondent, the Pennsylvania Railroad Company, became effective respectively, has been, and so long as said Rate Orders remain effective is, entitled to allowance of the free time for loading and unloading specified in said orders, and directs the said respondent to grant the same." [1 P. C. R. 49-55.]

Since the above order was issued the respondent has cancelled the tariffs then in effect, and in lieu thereof has published a new tariff schedule in which (1) the clause relating to demurrage and car service regulations is eliminated, and (2) complainant in addition to paying the regular rates published in the tariff is obliged to pay the rate of \$1.00 per day for each car used.

The local tariffs in question cover movements of cars between plants and parts of plants of complainant located between or in the vicinity of Thirtieth, Thirty-fifth, and Thirty-sixth streets, Pittsburgh, Pa. Some of the mills or portions of the mills are located on each side of the Conemaugh Division of the Pennsylvania Railroad. In the operation of its business, therefore, complainant must use the tracks of respondent to move its material and product from one mill or section of a mill to another. This switching is done by the power of the Pittsburgh and Allegheny River Railroad, an industrial branch railroad, owned and controlled by the complainant.

But all inter-plant and intra-plant movements across the tracks of the Pennsylvania Railroad Company are made under the direction of a conductor employed by respondent but paid by the Crucible Steel Company. No bill of lading is issued for these movements, but a shipping order from complainant is required which is used for the dual purpose of indicating where the car is to be moved, and of furnishing a memorandum to assess the

proper charges for the movement of the car. It is the contention of complainant that the general car demurrage rules which allow forty-eight hours' free time for loading or unloading apply in these inter-mill movements whereas respondent contends that the tariffs under which these movements are made cover trackage privileges and not transportation service and consequently the general demurrage rules do not apply.

Under rate orders R. No. 982 and R. No. 977 which were in effect at the time this Commission issued its order, a charge of 50 cents and \$2.50 per car was made for intra-mill and inter-mill movements respectively, and forty-eight hours' free time allowed for loading or unloading each car. This concession of free time was granted because the aforesaid tariffs under which the movements were made contained the usual clause for demurrage and car service regulations which provided for that amount of free time.

New local tariffs filed June 15th, effective July 20, 1914, superseded the old local rate orders aforesaid. The new tariffs were defined or designated as local freight tariffs or switching charges at Pittsburgh, Pa. Each was published under the caption: "Local freight tariff of charges for use of company tracks by individual power at Pittsburgh, Pa., Conemaugh Division." No reference to demurrage and car service regulations is made in these tariffs.

In its opinion in the former case, the Commission held that the provisions of the tariff in effect at the time must control in the matter of assessing demurrage. The Commission then said:

"We conclude, therefore, that the general demurrage regulations contained in said rate orders—and in any similar ones for these intra-plant movements, if such there be—control.

"In this view of the case it is unnecessary to study and analyze the movements in question and determine their exact character and the precise relation of the respondent to them."

Since the facts and conditions involved in the movement of the cars in this issue are precisely as they were found to be in the prior proceeding, the same rule of construction must apply to the tariff now in effect. Therefore, inasmuch as the present tariff has eliminated the clause relating to demurrage and is expressly lim-

ited by specification to charges made for the use of the railroad company's tracks, the assessment of demurrage would seem to fall automatically, if anywhere, under the uniform demurrage rules. These rules provide:

"On cars to be delivered on interchange tracks of industrial plants performing their own switching service, time will be computed from the first 7 a. m. following actual or constructive placement on such interchange tracks until returned thereto."

Under Rule No. 2 of the uniform car demurrage rules forty-eight hours free time is allowed for loading or unloading all commodities, time being computed from the first 7 a. m. following placement, or receipt of notice of placement, of cars on interchange tracks. The Crucible Steel Company is given this allowance of free time on all inbound and outbound cars moving in the transportation service of the railroad company. Witness for complainant testified at the hearing that on an inbound shipment forty-eight hours free time, from first 7 a. m. after receiving notice of placement of car, is allowed the steel company for unloading a car and returning it to the outbound trackage yard of the railroad company.

The issue before us, therefore, is confined wholly to the question whether the inter-mill movement of a car by individual power falls under the provisions and regulations of the aforesaid general demurrage rules. According to these rules free time is computed only in the case of cars moving in the general transportation service on inbound and outbound car loads when placed on interchange tracks by the carrier or for the carrier. The inter-mill service of the complainant is not a part of the transportation service of the carrier, but wholly separate and distinct from such service in its purpose and character. It is confined exclusively to the shipment of material or partially finished products from one mill to another, or from one part of a plant to another part of the same plant. In no sense is it a species of traffic directly linked with the transportation service of the carrier, as the general demurrage rules contemplate must be the case before free time can be allowed under their provisions.

This view of dealing with the matter does not come into conflict in any way with the question of free time where such is permitted in inter-mill service under special or local tariffs that may be on file now or that may have been on file heretofore. But it is saying in effect that in the absence of a special tariff to govern in the matter of free time and demurrage, the general tariff rules will control; and as the latter are framed to deal with traffic moving under the transportation system of the carrier, it cannot be properly held that a purely inter-mill service such as we have in the case before us will come within the purview of the general demurrage rules.

The arrangement as to certain regulations that must be observed by complainant in the movement of a car does not change the relation of parties in interest in the matter of free time to be allowed. The fact that a conductor employed by the railroad company has charge of the car when the tracks of the respondent are crossed, and the further fact that a shipping order is required before a car can be moved, do not connect these inter-mill shipments with the carrier's system of transportation. These restrictions are imposed by respondent for economic reasons, and do not vest complainant with any right or privilege to ask for free time because of them.

A conductor familiar with the operations and signals of respondent's railroad is employed merely as a precaution of safety against accidents that might otherwise occur, and the shipping order is required to show where the car is to go, and to supply a convenient record, for the purpose of accounting, of the number of cars that were moved. As the shipping order does not specify the character or amount of the lading, it can serve no purpose in the traffic outside of the mill district.

It is suggested by complainant that inasmuch as the debit days on the cars used in the inter-mill service are permitted to be cancelled by credit days earned on inter-state and intra-state shipments, the rules of demurrage are applied in part, and therefore, to be consistent in the matter, they should be applied as a whole. The plan adopted in this instance of dealing with debits and credits is a matter more of effecting a settlement when demurrage has accrued than a method of applying the rules of demurrage. In-

stead of working a hardship it appears to be more of the character of a concession granting relief to the complainant in allowing it to cancel its debits with credits instead of compelling it to pay them in cash. The rules of demurrage, except in the case of additional charges under Section B of Rule 7 do not require that debits must be cancelled by credits earned in the same service, by the same cars, under the same tariff. In following the aforesaid practice the respondent has in no wise departed from the letter and spirit of the published rules of demurrage.

Complainant also contends that there is a discrimination under existing tariffs between the movement of cars in industrial plants when made by the power of the railroad company and by individual power. It appears that under respondent's tariff P. S. C.-Pa. No. 69, a rate of \$3.00 per day between two plants of the same interest is charged for local movement by the carrier's power, distance not to exceed ten blocks. Forty-eight hours to load or unload are allowed under this tariff. Under respondent's tariff P. S. C.-Pa. No. 7, under which complainant operates, a rate of \$2.50 per car between two plants of the same interest is charged, distance not to exceed ten blocks, when the car is moved by individual power over the tracks of the carrier. This tariff does not make any provision for free time.

The two movements here compared differ materially in character and effect. When the power of the carrier is employed the movement of the car passes from the control of the industry whenever the original transfer has been made. In that case the car is placed at a particular point and cannot be employed while in possession of the industry for other movements in the inter-mill service until after it has been returned to the carrier. But when the car is moved by individual power it may be used not only in the initial movement between plants but also, by reason of the industry having control of the power, in minor movements for the collection and distribution of material between portions of the same mill. In the former transaction, movement of the car is definitely fixed between two given points; in the latter the car being moved by individual power, may be placed, if so desired, consecutively at different places in the plant in the course of a day. This greater facility for loading and unloading may be considered



of some advantage to the industry in a commercial way, and therefore will justify some difference in the rates and provisions of the tariffs which are applied in the two methods of delivery.

There is also some ground in this case to maintain that if the usual free time were allowed, in the inter-mill and intra-mill movements, on the plea that a delivery is made to the carrier whenever the car of the industry moves over the tracks of the railroad company, the privilege would be open to abuse, if strictly and logically followed, and consequently the period of free time could be extended more or less indefinitely. In view of the foregoing facts and considerations, the prayer of the petitioner is refused and the complaint dismissed.

#### ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

Now, to wit, April 8, 1915, it is ordered: That the complaint in this proceeding be, and the same is hereby dismissed.

By the Commission,  
SAMUEL W. PENNYPACKER, *Chairman*.

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#### DAVIS, ET AL., v. NORTHERN CENTRAL Rwy. Co.

##### *Station facilities at New Market, Pa.*

The complainants request the establishment of a passenger station at the village of New Market, Pa., on the line of the respondent. The evidence showed that the complainants now have adequate trolley facilities within a half-mile offered at rates below those of the respondent, that respondent maintains an adequate freight and passenger station within about a half-mile of the complainants, and that the traffic would not warrant the expenditure for a new station.

*Held:* The complaint should be dismissed.

## COMPLAINT DOCKET No. 305.

## Report and Order of the Commission.

## COMMISSIONER WRIGHT:

W. H. Davis and Martin W. Coulter, residents of the villages of New Market and Bella Vista complain against alleged inadequate passenger station facilities furnished by the Northern Central Railway Company, and ask that a passenger station be located at New Market.

New Market is a village in Fairview Township, York County, about three miles south of the City of Harrisburg, on line of respondent company, on the Susquehanna river, opposite the town of Steelton.

Bella Vista is north of New Market and separated on the north from the Borough of New Cumberland by the Yellow Breeches creek.

Bella Vista and New Market each have a population of about 200, and the residents of both villages are now served by the respondent and the Valley Traction Company, the respondent having a passenger and freight station at New Cumberland, and the Valley Traction Company having a terminal station at the Yellow Breeches creek, opposite Bella Vista, about 810 feet from the center of the village, and about 3,300 feet from the point where complainants desire the new railway station located in the village of New Market.

A hearing was fixed for February 18, 1915, at which the petitioners through their counsel requested a continuance and an adjourned hearing was held March 16, 1915.

The testimony shows that there are no industries located in either New Market or Bella Vista. Further testimony was as follows:

Q. Just state the inconvenience by which you reach York as far as railroad facilities are concerned.

A. I have to walk to New Cumberland and then go right down past my place again. That is about the only thing I can see, because there is no business there to do any business. If we had something there that we could secure business, there might be some business there.

Q. In so far as the various employments are concerned of the male population in New Market and Bella Vista, are not a great many of them employed in Steelton?

A. They are nearly all employed in Steelton.

Q. What would be the probable number of passengers who would utilize the station in New Market weekly?

A. It would be impossible for me to say. I would not like to give any estimate at all.

Q. There is one store in New Market, I believe?

A. Yes, sir.

Q. The reason you want a station is because it would save you a walk from your home down Market street to New Cumberland about once in two weeks, when you start out on your trips?

A. Yes, sir. Then again I work through territory up in Perry County, where instead of taking the trolley I could take the train.

Q. Just state to the Commission the reason for signing this petition.

A. For the benefit of the people when we want to go to York, the county-seat.

Q. Do you go to York?

A. Sometimes, when my business calls me there. I was there last January a year.

Respondent shows by testimony that Bella Vista is practically a suburb of New Cumberland; that New Market is separated from Bella Vista on the south by a field of about fifteen acres; that the citizens of New Market and Bella Vista principally work in Steelton, and when the river is open, use boats for the purpose of going to and from work. If the river is frozen solid, they walk across the ice if ferry is not available.

Witness testified that the present agency station at New Cumberland is adequate for all business offered by citizens of New Market, New Cumberland, and Bella Vista; that from center of New Market to terminus of trolley at the creek between New Cumberland and Bella Vista is 2,590 feet; that the trolley runs from said terminus to Harrisburg every half hour, giving good and adequate service; that during January, 1915, from New Cumberland railroad station to Harrisburg the ticket sales of the respondent averaged less than six a day. The railroad fare from

New Cumberland to Harrisburg is eight cents, and the fare from the station if located at New Market would be presumably greater. The fare via trolley line between Harrisburg and New Cumberland terminal opposite Bella Vista, is five cents.

Residents have more frequent service on trolley line with cheaper fare than by railroad. Witness estimated the cost to build the proposed station at \$575.00, and the cost yearly for maintaining same, including interest on the investment, about \$177.00. Witness says in his opinion the railroad company could not make it pay, as the number of people that would be benefited by the station is so small that they would not be justified in placing station there.

It is the opinion of the Commission that the respondent company in providing service at New Cumberland is performing a service which should be satisfactory to the two adjacent villages; that the towns of New Market and Bella Vista receive a full and adequate passenger service commensurate with the needs of the communities; that the respondent's present station facilities afford adequate and reasonable accommodations for all passengers who may desire to travel from New Cumberland, New Market, and Bella Vista, and that the case should be dismissed.

#### ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

Now, to wit, May 7, 1915, it is ordered: That the complaint in this proceeding be and the same is hereby dismissed.

By the Commission,

SAM'L W. PENNYPACKER, *Chairman.*

**BIXLER, ET AL., v. UNITED ELECTRIC CO. OF LEMOYNE.**

*Electric light companies—Refusal to make extension of line—  
Lack of customers to justify extension.*

Two complainants requested the extension of the respondent's lines so as to furnish them with service. The evidence showed that the extension would require a pole line of 1,300 feet and that there were not sufficient customers in sight or in prospect to warrant the expense involved. An offer having been made by the company to construct the line under certain guarantees to be made by the complainants, the Commission directed the offer to be held open for the period of six months, and dismissed the complaint.

**COMPLAINT DOCKET No. 331.****Report and Order of the Commission.****COMMISSIONER BRECHT:**

There are two complainants in this proceeding. Both are residents of South Earlington, a district in the Borough of Camp Hill, Cumberland County. South Earlington lies in the extreme western part of the borough, contains thirteen houses scattered throughout the district, and is cut off from the built-up portion of Camp Hill by land practically unoccupied. The Borough of Camp Hill has a population of about 1,000 people, and is supplied with current for electric light and power by the respondent company.

In the answer of the respondent it is set forth that the United Electric Company of Lemoyne "has erected and maintained poles, wires and other necessary equipment to furnish with electric light and power practically all of the residents of Camp Hill Borough; that the poles and wires of the corporation respondent are so placed and maintained and operated that at least ninety-five per cent. of the population of the Borough of Camp Hill can receive service from respondent company, if they so desire." The nearest poles and wires to complainants now erected by the electric company are however, 836 feet from the residence of the one complainant, and 1,370 feet from the other.

In response to several requests made by complainants to the electric company for light, the respondent corporation on Decem-

ber 7, 1914, refused to furnish current on the ground that the cost of installing the necessary wires would prove too expensive for the return of revenue derived from only two subscribers. It was submitted at the hearing by the president of the electric company that the cost of erecting a pole line to reach the dwellings of the complainants would cost \$230.76. The construction would require thirteen poles, one 1,000-watt transformer, over 3,000 feet of wire, five ampere meters, sixty incandescent globes, and other structural units, making with the item of labor to install it a total initial cost of \$230.76.

The testimony submitted shows that the average revenue received from each consumer in the Borough of Camp Hill is \$1.50 per month. Upon this basis the return in money from the two complainants would amount to \$36.00 per annum. The annual interest charge upon the line that must be constructed exclusively for the complainants, including depreciation and maintenance charge, according to the figures of the respondent, would amount to \$35.40, leaving but 60 cents per year to pay for the cost of operation.

Both complainants have their houses connected with the Bell telephone lines. It was consequently contended by complainants that the electric company could place the light wires upon the telephone poles and thus furnish the service for lighting at a nominal expense. Respondent admitted that it had an agreement with the Bell company to use the poles of the latter under certain conditions and restrictions, but could not avail itself of that privilege in this instance because the telephone poles are placed too far apart to make a safe construction.

The span between the telephone poles is 130 feet, while that between the electric light poles is only 100 feet, and consequently it was contended by respondent that by reason of the great distance between poles, the necessary sagging of the lines, and the high tension of the light wires, the proper clearance could not be secured on the telephone poles to make the construction safe. If, however, the telephone company would permit the use of its poles for this construction, it would become necessary to make a proper standard construction to reset the poles and put in three additional poles. The line when thus reconstructed would become

the property of the telephone company, while the cost of rebuilding it would have to be paid by the respondent. This plan would, therefore, prove upon the whole a more expensive proposition to the electric company than to build an entirely new line.

From the testimony presented it appears that the prospects of future building and improvement in South Earlington, so far as that matter can now be determined, and the consequent demand for increased electric light service, do not seem to be encouraging. It was testified that South Earlington was laid out seven or eight years ago, and has now but thirteen houses more or less scattered. No application for electric light had been made to respondent from that section before, nor are there other houses in that district that could be taken in or connected with the line that would reach the dwellings of the complainants.

The president of the electric company upon the question of how many consumers would be required to justify the construction of the line under consideration testified as follows:

Q. How many patrons or customers would you require before you would construct a line of that character?

A. We never had any fast rule on that. I can say we ought to have twice the revenue.

Q. That is, four consumers?

A. Yes, sir.

Q. Have these complainants done any missionary work?

A. There are no houses there that can be taken in with this line.

It was suggested by the Commission at the hearing, in view of the unfortunate position in which both parties in interest were placed in the matter, that some compromise plan be evolved that could be accepted by both parties to the issue. A conditional proposition was then submitted to complainants to the effect that if they would pay the yearly rental of telephone poles of 50 cents per pole, provided the telephone company would permit the use of its poles, the electric light company would make an effort to see its way clear to install the service. Complainants were given time to take the proposition home and consider it. Subsequently as appears from a letter from their counsel to the Commission, complainants notified the company that they were ready and willing to accept the offer submitted to them.

There is nothing appearing to show whether the consent of the telephone company could or could not be obtained for the use of its line of poles. But in commenting upon complainants' acceptance of the proposed offer, counsel for respondent corporation states, *inter alia*, that "the poles of the Bell Telephone Company now in place are too far apart to support the wiring necessary to carry electric current for lighting the houses of your clients (complainants) and if this pole line should be reconstructed, by placing the poles closer together and adding additional poles, the cost would be practically no less than for the electric company to construct a pole line for its own use." Respondent also holds that the poor prospect of getting additional consumers from that section, and the right of complainants to discontinue service at any time, would not offer adequate remuneration for the outlay required. But it was set forth that the electric company is willing to enter into the following agreement with complainants:

Complainants to pay the company \$100.00 and the company to agree to refund this \$100.00 at the end of five years, if complainants and two additional customers, who have each located within one hundred feet of any one of the new poles erected, shall remain customers of the company for three years.

There was no evidence offered which indicated that the respondent could furnish service to complainants at present and for some years to come, except at a loss and at the risk of having its service discontinued sooner or later after incurring the expense of installing the same.

Under conditions so uncertain and precarious the Commission would not feel warranted in requiring the respondent to install the service requested by complainants, unless it were to append to the order some guaranty or element of protection somewhat similar to the one contained in the offer submitted by respondent. The proposition suggested by the company can not be considered extravagant under existing circumstances, and seems to be about the only feasible method respondent could take to protect itself against furnishing a service that might, in spite of intentions and assurances to the contrary, prove to be comparatively transient.



A company can not reasonably be expected to construct a pole line of thirteen hundred feet and more for the purpose of furnishing light when there are neither sufficient consumers in sight nor in prospect to cover the expense of the construction necessary to supply such service. An order will be issued to dismiss the case with the proviso or recommendation that the time specified in the offer to refund the \$100.00 paid in advance be changed from five years to three years, and that the offer as thus modified, of the respondent company remain open to complainants for their acceptance at any time within the next six months from the date of this ruling.

#### ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

Now, to wit, May 7, 1915, it is ordered: That the complaint in this proceeding be and the same is hereby dismissed; provided: That, in the offer of the respondent referred to in said report, the time specified to refund the \$100.00 paid in advance be changed from five years to three years, and that the offer, as thus modified, remain open to complainants for their acceptance at any time within the next six months from the date of this order.

By the Commission,  
SAM'L W. PENNYPACKER, *Chairman*.

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CURRY, ET AL., v. EMLENTON WATER COMPANY.

*Rates—Fair return on investment—Comparison of rates—Reproduction cost—Depreciation—Abandoned property value.*

Complainants alleged that the rates of the respondent were unreasonable and were higher than those paid for similar service elsewhere. The testimony did not show the character of the plants nor the amounts invested

in other places. The books of the company have not been well kept and do not show property accounts properly.

In the absence of proper books showing property accounts and after an inspection of the books of the company by the Commission's accountant and the physical property by the engineer, the reproduction cost new, less depreciation and less the value of abandoned property, was taken as the proper basis for rate making. It having been found that the present rates of the company do not provide more than a fair return upon the value of the property invested, it was

*Held:* The complaint should be dismissed.

### COMPLAINT DOCKET No. 297.

#### Report and Order of the Commission.

#### COMMISSIONER WRIGHT:

Citizens of the Borough of Emlenton, Venango County, filed a complaint against the Emlenton Water Company alleging that their charges are excessive and more than other companies charge for like service.

Emlenton has a population of about 1,200, and the evidence shows that most of the people own their own houses and the majority of them have bath rooms and closets; that the water is pumped from the river to an elevation of about 300 feet to a reservoir, from which it supplies the town by gravity, that a filter is now built ready to use, at an approximate cost of \$11,000, that the Emlenton Water Company started as a local enterprise in the year 1874 and was incorporated under a State charter in 1879, with a capital of \$12,600, which subsequently was increased to \$20,000.00; with exception of superintendent the officers drew no salary for many years; the books and accounts have been kept in such unbusinesslike manner that it would be very difficult to determine the historical cost of the property.

It was testified by witnesses for respondent that the reproduction value of the property was \$88,590.00, less allowance for depreciation, leaving depreciated value as of January 1, 1915, of \$76,256.00, which value eliminates a stated amount of abandoned property, things not to-day in use. The value of abandoned property, without depreciation, found to be \$12,719.27, representing expenditures which were made with intent to meet necessities and

exigencies of the time at which the expenditures were made and afterwards rendered impracticable or obsolete; that revenues from actual sales for 1913 amounted to \$6,465.00, and the expenses \$2,400.00, leaving a profit of \$4,064.00; that in 1914 sales amounted to \$6,384.00, and actual operating expenses \$2,622.00, leaving a profit of \$3,762.00; that now with filter installed the plant will necessitate double pumping, more attention to filter plant, expense for an extra man, an additional engine and other expenses which will increase expenditures to \$4,610.00; that 1%, or \$760.00, should be allowed for depreciation in order to keep the plant up to normal.

Complainants' witness testified as to rates of water companies in other towns, but it was not shown that the character of the plants, the surroundings nor amounts invested were similar.

In view of the fact that the defendant company has not kept proper books showing property accounts, the reproduction value is in this case taken as a basis for rate-making.

Upon suggestion agreed to between opposing counsel and for the purpose of corroboration, the chief of the Bureau of Accounts and Statistics has visited Emlenton and looked over such records as were obtainable, and the chief of the Commission's Bureau of Engineering also personally inspected the physical condition of the plant.

After giving full consideration to all the evidence based upon estimates made by witnesses and after considering the report of Engineer Snow of the Commission, the Commission is of the opinion that a fair present value for the property and franchises of the Emlenton Water Company is \$62,052.00, and that the expenses and cost of administration will be so increased by the operation of the filter plant now installed, as required by the State, the additional power for pumping, without allowing for depreciation, that there will not be more than a fair and adequate return upon the investment based upon the present rates.

This complaint is that the charges are excessive and no question of adequacy of supply or quality of water is at issue, but there was some testimony bearing upon the quality of the water by reason of "dead ends" in mains. The Commission is assured that

the company will remedy these "dead ends" wherever they are found to exist.

"The cost of water to a company includes a fair return to the persons who furnish the capital for the construction of the plant in addition to an allowance annually of a sum sufficient to keep the plant in good repair and to pay any fixed charges for operating expenses." What the company is entitled to demand in order that it may have just compensation is a fair return upon the reasonable value of the property at the time it is being used for the public.

The Commission will require that the respondent company forthwith open and keep proper books of property and accounts based upon a detailed inventory of the property as it now stands and that a complete report of cash receipts and disbursements be installed and kept, and the case is hereby dismissed.

After full consideration of all the evidence as to value of property, revenue as shown, the necessary expenses and depreciation incident to the proper conduct of its business, it is the opinion of the Commission that the complainant has failed to show that the rates are excessive, and the complaint should be dismissed.

#### ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties and full investigation of the matters and things involved having been had, and the Commission having, on the date hereon, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

Now, to wit, May 7, 1915, it is ordered: That the complaint in this proceeding be and the same is hereby dismissed.

By the Commission,  
SAMUEL W. PENNYPACKER, *Chairman*.

**BOROUGH OF SCHUYLKILL HAVEN v. SCHUYLKILL HAVEN GAS & WATER Co.**

*Duty of public service company—Failure to provide adequate water supply—Remedy.*

The evidence in this case showed a failure on the part of the respondent company to fulfill its part of a contract made with the complainant several years ago when a proceeding in quo warranto was compromised, and a failure to provide an adequate supply of water for the needs of citizens in the complainant borough.

*Held:* It is the duty of the respondent to furnish an adequate supply of pure water, and one of the purposes of the Public Service Company Law is to compel the performance of that duty. Order entered requiring necessary steps to be taken to secure an adequate supply.

**COMPLAINT DOCKET No. 171.**

**Report and Order of the Commission.**

**COMMISSIONER WALLACE:**

The Schuylkill Haven Gas and Water Company was incorporated under special act of assembly approved the 14th day of February, 1865, for the purpose of furnishing water to the inhabitants of the Borough of Schuylkill Haven. This company later accepted the provisions of the General Incorporation Act of 1874.

The company in the year 1884 commenced the building of a reservoir and the laying of pipe lines through the streets and highways of the borough and since that time has been supplying water to the public in the said borough.

On August 26, 1909, the Borough of Schuylkill Haven filed a petition in the office of the attorney general of the Commonwealth of Pennsylvania, requesting him to institute quo warranto proceedings against the respondent company, averring, among other things, an inadequate and insufficient supply of pure water, and after hearing the attorney general granted the request of the borough and the quo warranto proceedings were begun in the Court of Common Pleas of Schuylkill County on February 14, 1910, to which an answer was filed by the said water company. Before any decision was made by the said court of Schuylkill County, a

compromise agreement was entered into between the borough and the company. This agreement provides that the company will furnish an additional water supply from a stream known as Hummels run, and if the additional "water supply to be secured from the said Hummels run should prove inadequate, it will at once extend the pipe line to a stream known as Borgenbach's, in Wayne Township, Schuylkill County, at a point from which the water therefrom can be readily delivered to the breast of Panther creek dam."

The additional supply of water from Hummels run proved inadequate and, although requested by the borough, the company has failed and refused to build an additional reservoir or to connect the Borgenbach's run with the Panther creek reservoir.

The borough in its complaint in this case alleged that the respondent company does not furnish to the public an adequate and sufficient supply of pure water nor an adequate protection against fires.

A number of hearings were held in this case and a large amount of testimony taken. Without any discussion of the evidence of the various witnesses, we think that the testimony clearly shows that the water supply of the respondent company furnished to the Borough of Schuylkill Haven is not sufficient to meet the demands of its inhabitants for domestic and manufacturing purposes and for the extinguishment of fires. It is the duty of the water company to furnish an adequate and sufficient supply of water to the borough, and one of the purposes of the Public Service Company Law is to protect the borough and require the water company, by proper order, to make such additions to its facilities and changes in its operation as will give to the borough an adequate and sufficient supply.

It is the opinion of the Commission that the respondent company should secure an additional supply of water from Borgenbach's run, or some other stream of equal size and purity.

That the respondent company shall keep open the valve installed for the purpose of reducing the pressure in the main line, about three miles from the reservoir, and not reduce the flow of water from the reservoir to the borough.

That the respondent company extend the eight-inch supply main

pipe from the present terminus at the corner of Main and Dock streets eastwardly about 3,000 feet to the central part of "Fairmount Addition."

That the respondent water company shall, under all ordinary conditions, keep the gate valve on the eight-inch main supplying the borough with water from the Panther creek reservoir, wide open.

That the respondent water company shall permanently install two self-recording pressure gauges: one on the pipe line at a point on the hill in the "Fairmount Addition," and another on the pipe line at a point in the central part of the borough.

That the respondent water company shall install and keep in operation at the Panther creek reservoir a self-registering gauge.

That the said respondent water company shall protect the reservoir from contamination or pollution by animals, and also from the surface wash from the road, by the erection of a fence around said reservoir.

Therefore, an order will be entered directing the company to comply with this finding and determination.

#### ORDER.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

Now, to wit, May 7, 1915, the Schuylkill Haven Gas and Water Company is hereby ordered:

First: To secure an additional supply of water from Borgenbach's run, or some other stream of equal size and purity.

Second: To keep open the valve installed for the purpose of reducing the pressure in the main line, about three miles from the reservoir, and not reduce the flow of water from the reservoir to the borough.

Third: To extend the eight-inch supply main pipe from the present terminus at the corner of Main and Dock streets east-

wardly about 3,000 feet to the central part of the "Fairmount Addition."

Fourth: To keep, under all ordinary conditions, the gate valve on the eight-inch main supplying the borough with water from the Panther creek reservoir, wide open.

Fifth: To install permanently two self-recording pressure gauges: one on the pipe line at a point on the hill in the "Fairmount Addition," and another on the pipe line at a point in the central part of the borough.

To install and keep in operation at the Panther creek reservoir a self-registering gauge.

To protect the reservoir from contamination or pollution by animals, and also from surface-wash from the road, by the erection of a fence around said reservoir.

By the Commission,  
SAM'L W. PENNYPACKER, *Chairman*.

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#### APPLICATION OF PEOPLES NATURAL GAS CO. AND BOROUGH OF JUNIATA.

##### *Approval of franchise contract—Competition between natural and artificial gas companies—Contract ultra vires.*

The Peoples Natural Gas Company and the Borough of Juniata joined in a petition for the approval of a franchise contract giving said company the right to supply natural gas to the public in said borough, and, when the supply of natural gas is insufficient to give adequate service, then to supply artificial gas. The said company has the power under its charter to supply natural gas in the said territory, but has no power to manufacture or sell artificial gas either here or elsewhere.

The Altoona Gas Light & Fuel Company now supplying artificial gas in the said borough, protested.

*Held:* 1. Although used for the same purposes, natural and artificial gas are essentially different commodities, and in such case the Commission will not restrain competition.

2. The portion of the contract giving the applicant the right to supply artificial gas is beyond the powers of the company and is void, but this is no objection to the remainder of the contract which should be approved.



## MUNICIPAL CONTRACT DOCKET No. 367, 1914.

## Report and Order of the Commission.

## COMMISSIONER GATHER:

A joint petition is filed by the Peoples Natural Gas Company and the Borough of Juniata, Blair County, for a Certificate of Public Convenience approving a franchise ordinance, enacted by council October 5, 1914, and formally accepted by the company November 4, 1914. Franchise rights and privileges are granted unto the company "for the purpose of supplying natural or manufactured gas for fuel and lighting purposes, "for a term of forty years. Section 10 of the ordinance reads in part: "The said Peoples Natural Gas Company," etc., "shall not have the right under this ordinance to sell and distribute manufactured gas until such time as the supply is no longer sufficient to give adequate service of natural gas throughout the borough. Upon such diminution or failure in volume of natural gas, the said Peoples Natural Gas Company, its successors or assigns, may then use its pipe lines and other appliances in the borough for the distribution and sale of manufactured gas."

The Peoples Natural Gas Company was organized under the "Natural Gas Act" of May 29, 1885, for the purpose of "producing, distributing and selling natural gas" only in the City of Pittsburgh and eastwardly as far as and including the City of Altoona. On July 5, 1909, the charter was so amended to take in additional territory, including the Borough of Juniata, mentioned herein. Neither in the original or amended charter the term "manufactured gas" is referred to.

To the issuance of a Certificate of Public Convenience a protest is filed by the Altoona Gas Light and Fuel Company. This company is organized for the purpose of manufacturing and selling artificial gas, and since March 7, 1903, has been operating and doing business in Juniata Borough, the territory the natural gas company is now seeking to also occupy.

The first objection raised by the protestant company is that at the present time it is supplying the inhabitants of the borough with

gas for light and fuel, and that it should be protected by this Commission from competition.

Counsel for the protestant company, cites a large number of decisions in support of the contention that the Commission should sustain this objection, but apparently none of them, nor any others we can find, go so far as to say that an artificial gas company should be protected in its field from the competition of a natural gas company. They all deal with the subject from the basis of a similar commodity, or the rendering of like service by two public service corporations.

The principal witness for the petitioners, admitted by counsel for the protestant company, to be an expert, testified as to the distinction between artificial and natural gases. He said: "The B. T. U. (British Thermal Unit) in natural gas is about 1100. The B. T. U. in artificial gas runs from 450 to 650. . . . On account of the difference . . . in heat unit, the consumers naturally take the article which gives them the best returns for their money. The price in Juniata of artificial and natural gas compared, would be about six to one, taking into consideration both heat unit and price." Considerable differentiation is manifest in the analysis of gases, and authorities do not attempt to confuse natural with certain artificial gases, such as those made from coal, oil, etc.

That the people of the borough want natural gas there is no doubt [they] having demonstrated this by petition, and the ordinance itself provides that the rate to be charged for natural gas, shall under no conditions, be as high as fifty per cent. of the rate charged for artificial gas by the protestant company. No company has the right to expect a Commission to protect it against the competition of a product which can be supplied at less than one-half the cost of another product and answer the same purposes.

This Commission cannot but have in mind the question of competition insofar as modern and more advantageous services are concerned, at a less cost, and if one company by reason of its superior advantages, gives to the public a service as good as the existing utility, at very much lesser rates, the interests of the

public should prevail, and for these reasons the first objection raised by the protestant company cannot be sustained.

The second objection raised by the Altoona Gas Light and Fuel Company, is that the Commission should not approve a franchise granting the rights to a natural gas company which said company has no authority to receive or exercise.

There seems to be no doubt that councils of a municipality cannot vest in a corporation rights which it is not authorized to exercise by its charter, and apparently the company joining in the petition, realizes this as the attorney representing it stated: "We make no claim that the company as now constituted has the right to distribute artificial gas."

The municipality has no right to authorize this company to supply manufactured gas, nor does the company have the right to become a means for the passing on of a franchise for that purpose from the municipality to some other company. It is apparent the features of the ordinance relating to the manufacture, selling, distributing or otherwise dealing in artificial gas, are void and the only valid portions are the assent of the municipality and those conditions which relate to the manner of constructing the plant proposed. On this point let us quote Mr. Justice STERETT in the Appeal of the City of Pittsburgh, 115 Pa. 4: "Councils are authorized to give or withhold their consent, without more. They have no right to couple their assent with any condition or restriction not imposed by the act, unless the company agrees to accept the same and be bound thereby, and even then, the conditions or restrictions so accepted by the company, must harmonize and in no wise conflict with the provisions of the act. . . . In view of the limited authority delegated to councils, it is a grave mistake to assume . . . that they have the power to legislate on any and everything directly or indirectly connected with the general subject," and finally, "One section of an ordinance may be declared reasonable and valid, while another section of the same ordinance may be pronounced unreasonable and void."

Taking everything into consideration in this case this Commission cannot hold that the ordinance herewith attacked is invalid in its entirety, and for the above reasons the second objection must also fall. Should the Peoples Natural Gas Company

desire to enter the business of manufacturing and selling artificial gas, it will be necessary to obtain the consent of the Commonwealth, but not before applying to this Commission for a Certificate of Public Convenience.

An attempt was made by the petitioners to convince the Commission that the Altoona Gas Light and Fuel Company is not rendering adequate service to its customers in the Borough of Juniata. While it is true the company has not made any extensive extensions during the past several years in this growing community, it cannot be determined from the testimony, that it has been wholly negligent. The investment of this corporation is placed at \$70,000 in the Borough of Juniata. Since 1907 it has been paying reasonable dividends on its preferred stock. It is now supplying 332 customers.

There is no contention [that] the Peoples Natural Gas Company will not live up to its contract with the borough. It is obtaining its supply of natural gas from about 600 wells owned by it, and purchases gas from 3,600 other wells in West Virginia. It completed its line across the mountain into Altoona during the year 1913 at a cost of \$460,000, with a now total investment in that city of about \$530,000. Its principal officer estimates an expenditure in the Borough of Juniata of about \$65,000, and expects to serve about 1,300 customers, anticipating a five per cent. increase each year.

For the above stated reasons and under all the facts in the case, the Commission is of the opinion that the ordinance franchise contract between the Peoples Natural Gas Company and the Borough of Juniata should be approved and an order will be so entered.

#### ORDER.

This case being at issue upon petition and protest on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof, made and filed of record a report containing its findings of fact and conclusion thereon, which said report is hereby referred to and made a part hereof :

Now, to wit, it is ordered: That a Certificate of Public Convenience be issued, evidencing the Commission's approval of ordinance contract between the Peoples Natural Gas Company and the Borough of Juniata.

By the Commission,  
SAMUEL W. PENNYPACKER, *Chairman*.

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LEHIGH FIRE BRICK WORKS, ET AL., v. PENNSYLVANIA RAILROAD  
Co., ET AL.

*Carriers—Through routes—Joint rates.*

Complainants aver that there is an actual physical railroad connection between the coal and coke fields of Western Pennsylvania by way of the Pennsylvania Railroad to Mt. Carmel, thence by the Lehigh Valley Railroad to Lizard Creek Junction, and thence by the Lehigh & New England Railroad to the plants of the complainants in Catasauqua, Pa.; that through routes and joint rates are now established by said route to Palmerton, on the line of the Lehigh & New England Railroad, a short distance from Catasauqua; and that similar routes and rates are not allowed to the complainants.

The routes at present used do not deliver shipments to the plants of the complainants, but necessitate a switching movement at the end of the haul, for which a charge of 50 cents per ton is made.

*Held:* That the respondents should establish a through route and joint rate via Mt. Carmel and Lizard Creek Junction as asked for, and that said rates be 5 cents per ton higher than the existing rates to Palmerton.

COMPLAINT DOCKET NO. 344.

Report and Order of the Commission.

COMMISSIONER PENNYPACKER (Chairman):

The complaint sets forth in substance that the complainants are corporations chartered in Pennsylvania engaged in the manufacturing business in the Borough of Catasauqua, all using bituminous coal, and that one of them, the Crane Iron Works, uses both coal and coke; that the fields from which they draw their supplies of coal and coke are in this State, along the lines of the Pennsylvania Railroad Company, and are known as the Gallitzin, Latrobe, Connellsville, Clearfield, and Westmoreland rate groups;

that the respondents are common carriers engaged in the transportation of persons and property; that the plants of complainants in Catasauqua are located on the line of the Lehigh & New England Railroad Company, and that the line of no other carrier reaches these plants; that the Lehigh & New England Railroad Company connects with the railroad of the Lehigh Valley Railroad Company at Lizard Creek Junction, Pa., and the railroad of the Lehigh Valley Railroad Company connects with the railroad of the Pennsylvania Railroad Company at Mount Carmel, Pa., and at each of these points a physical connection exists; that it is practicable and convenient to transport coal and coke in the same cars from the fields of the designated rate groups over the line of the Pennsylvania Railroad Company to Mount Carmel, Pa., thence over the line of the Lehigh Valley Railroad Company to Lizard Creek Junction, and thence over the line of the Lehigh & New England Railroad Company to Catasauqua and the plants of the complainants; that through routes and joint rates are now established from the said fields to Palmerton, Pa., upon coke from Gallitzin, \$1.60 per ton; from Latrobe, \$1.80 per ton; from Connellsville, \$2.00 per ton (the ton being 2,000 lbs. in each case); and upon coal from the Clearfield and Latrobe groups, \$1.70 per ton; from Greensburg, \$1.80 per ton; from Westmoreland, \$1.95 per ton (the ton being 2,240 lbs. in each case); that Catasauqua is on the line of the Lehigh & New England Railroad Company, a short distance east of Palmerton; that no through routes and joint rates exist to Catasauqua, and that complainants are required to pay unjust and unreasonable rates for the transportation of coke and coal to their plants. The complaint prays for the establishment of through routes and joint rates not in excess of those now in effect to Palmerton.

The answer of the Pennsylvania Railroad Company, respondent, denies that the route for the transportation of coke and coal over the line of the Pennsylvania Railroad to Mount Carmel, thence over the line of the Lehigh Valley Railroad to Lizard Creek Junction, and thence over the line of the Lehigh & New England Railroad to the plants of complainants would be a convenient route, and avers that this route is less practicable and convenient than the three routes already established. The answer admits

that the respondent participates in joint rates on coal and coke to Palmerton, and avers that the circumstances and conditions existing at Catasauqua are substantially different and dissimilar. It further denies that the rates to Catasauqua "are unjust, unreasonable or otherwise unlawful."

The answer of the Lehigh & New England Company, respondent, admits the averments of the complaint as to the railroad connections and rates to Palmerton; that no through routes and joint rates exist to Catasauqua, and that the rates and charges for the transportation of coal and coke to the plants of the complainants involve a combination of through and local rates which are unjust. It avers that the respondent has been ready and willing to join with the Pennsylvania Railroad Company and the Lehigh Valley Railroad Company in the making and publishing of proper joint through rates on bituminous coal and coke to the plants of the complainants upon the usual terms and conditions applicable to such traffic under similar conditions; that joint through rates on other commodities to and from Catasauqua have been made and published by the Pennsylvania Railroad Company, the Lehigh Valley Railroad Company, the respondent and other carriers; that it is ready and willing to handle coal delivered to it at Lizard Creek Junction for the same rates and the same divisions as now exist with respect to coal and coke shipped to Palmerton; that it has made and published a tariff, P. S. C.-Pa. No. 288, effective December 1, 1914, "fixing a rate of 50c upon coke and coal handled by it," to be effective only in the absence of through rates. It will be observed that the last averment is imperfect and incomplete since there is no statement as to what quantity of coal and coke the 50c applies.

The answer of the Lehigh Valley Railroad Company avers that it is an intermediate line; that it does not originate any of the traffic described, and that it has been and continues to be ready and willing to establish through rates in connection with other carriers over the roads referred to by the complainants for the same charges which have heretofore accrued to it prior to December 1, 1914.

The material facts found from the testimony presented are as follows:

The plants of the Crane Iron Works, the Bryden Horse Shoe Company, and the Lehigh Fire Brick Works, the complainants, are located in the Borough of Catasauqua, on the east bank of the Lehigh River. The two latter use bituminous coal, and the Crane Iron Works uses both coke and coal. The two furnaces of this corporation consume 190,000 tons of coke and 5,000 tons of coal each year. In large measure the coal so used comes from the Westmoreland, Greensburg, and Clearfield coal districts, and the coke from the Gallitzin, Latrobe, and Connellsville coke districts, all in Western Pennsylvania. There are at present three through routes by means of which the coal and coke originating in these districts may find transportation by rail to Catasauqua. On the first of them the commodities are transported over the Pennsylvania Railroad to Mount Carmel, and are there delivered to the Lehigh Valley Railroad. On the second the commodities are transported over the Pennsylvania Railroad to Buttonwood, and are there delivered to the Central Railroad of New Jersey. On the third, the commodities are transported over the Pennsylvania Railroad to Harrisburg, and are there delivered to the Philadelphia & Reading Railway. The point of delivery upon the Central Railroad of New Jersey is in the Borough of Catasauqua, upon the east side of the Lehigh river, but between it and the plants of the complainants runs the Lehigh canal. The point of delivery upon the Lehigh Valley Railroad and upon the Philadelphia & Reading Railway is not in the Borough of Catasauqua at all, but is within a near township upon the west side of the Lehigh river. By neither of these three through routes is there any connection with the plants of the complainants.

The existing rates published by the Pennsylvania Railroad Company by each of these routes are as follows: Upon coke from Gallitzin, rate group, \$1.60 per ton, 2,000 lbs.; from Latrobe, rate group, \$1.80 per ton, 2,000 lbs.; from Connellsville, rate group, \$2.00 per ton, 2,000 lbs. Upon coal from Clearfield and Latrobe, rate group, \$1.70 per ton, 2,240 lbs.; from Greensburg, rate group, \$1.80 per ton, 2,240 lbs.; from Westmoreland, rate group, \$1.95 per ton, 2,240 lbs.

The only way in which the cars loaded with coke and coal can reach the plants of the complainants from these points of delivery



is by a further transportation over the tracks of the Lehigh & New England Railroad, which road makes an additional local or switching charge of fifty cents a ton. This rate was put into effect December 1, 1914, with the result that one of the furnaces of the Crane Iron Works is out of blast and the other was banked on the 13th of December, 1914. The charge of fifty cents a ton increased the expenses of manufacturing iron at the Crane Iron Works about \$97,500 per annum.

Prior to the year 1914 the Crane Railroad Company owned tracks in the Borough of Catasauqua which connected with the plants of the complainants and also with the tracks of the Central Railroad of New Jersey within the borough, and also with those of the Lehigh Valley Railroad Company on the west bank of the Lehigh river. The Empire Steel and Iron Company, which owned the Crane Iron Works, was also the owner of the stock of the Crane Railroad Company. In 1907 this latter company established a rate of \$2.00 per car upon coke and coal transported over its lines to the plants of the complainants, and this rate remained in force until November 30, 1914. The charge was absorbed by the through lines of railroads or one of them. However, in the cases of Crane Railroad Company v. the Philadelphia & Reading Railway Company, et al., 15 I. C. C. 248, and the Crane Iron Works v. the Central Railroad of New Jersey, 17 I. C. C. 514, the Interstate Commerce Commission held that the Crane Railroad Company was a plant facility of the Crane Iron Works, and therefore not entitled to share in through rates. Thereafter the through lines refused to absorb the \$2-rate so far as it affected shipments to the Crane Iron Works. In 1914 the Crane Railroad was sold to the Lehigh & New England Railroad Company, and whatever may have been its legal status before there can be no question that thereupon it became a part of the railroad system of that corporation.

The distance from Palmerton to Catasauqua is about twenty-five miles.

Upon this state of facts we think it is apparent that the through rates asked for by the complainants and reasonable and just joint rates for the service ought to be established. While it is true there are already three routes which are called through routes to Cata-

sauqua, they are ostensible rather than real since they do not reach the points of delivery formerly reached by the Crane Railroad, now a part of the Lehigh & New England Railroad. Since the tracks are connected and the service may be rendered there seems to be no sufficient reason why the route should not be established.

Section 7 of Article V of the Act of July 26, 1913, provides the Commission "shall also have power to establish through routes and joint rates and classifications for the conveyance of persons and property between any two or more points within this Commonwealth whenever the railroad corporations concerned shall have refused or neglected voluntarily to establish such through routes and joint rates and classifications, and to prescribe the just terms and conditions under which said through routes shall be operated."

The route so established involves an additional service in the transportation of coke and coal from the point of connection with the tracks of the Lehigh & New England Railroad Company to the plants of the complainants. It involves also arrangements with an additional carrier whose terminal facilities and other sources of expense must be maintained. For this service, since it originated, a charge has always been made. Whatever sum would be a reasonable and just compensation for this service ought to be added to the rates to Catasauqua as they now exist.

The Lehigh & New England Railroad Company says in its answer that it is willing to handle coal delivered to it at Lizard Creek Junction for the same rates and the same divisions as now exist with respect to coal and coke shipped to Palmerton.

From 1907 to 1914, a period of seven years, the charge for a similar service was \$2 per car. A car contained from forty to fifty tons. The charge was therefore from four to five cents a ton.

Thomas J. Fretz, the general freight and passenger agent of the Lehigh & New England Railroad Company, testified that the usual terminal switching charge on coal and coal products was thirty cents a ton.

Robert H. Large, the general coal and freight agent of the Pennsylvania Railroad Company, testified that in his opinion a proper and reasonable charge for the transportation from the

common tracks to the plants would probably be fifteen to twenty cents per ton.

Upon the whole the Commission are of the opinion that the best guide is the charge that was continued with apparent satisfaction to both parties for seven years, and that a proper charge for this service would be the sum of five cents a ton to be added to the rates now in existence.

An order will therefore be issued directing the respondents to establish a through route for the transportation of coke and coal from the designated points of origin on the line of the Pennsylvania Railroad to the plants of the complainants as follows:

Over the lines of the Pennsylvania Railroad Company to Mount Carmel, Pa., thence over the line of the Lehigh Valley Railroad Company to Lizard Creek Junction, and thence over the line of the Lehigh & New England Railroad Company to the plants of the complainants, and further directing that the joint rates for the transportation of coal and coke over the said route shall be as follows: Upon coke from Gallitzin, \$1.65 per ton, 2,000 lbs.; from Latrobe, \$1.85 per ton, 2,000 lbs.; from Connellsville, \$2.05 per ton, 2,000 lbs. Upon coal from Clearfield and Latrobe, \$1.75 per ton, 2,240 lbs.; from Greensburg, \$1.85 per ton, 2,240 lbs.; from Westmoreland, \$2.00 per ton, 2,240 lbs.

It is the opinion of the Commission that each of the railroad companies whose three routes to Catasauqua have been hereinbefore described should in connection with the Lehigh & New England Railroad Company establish a through route to the plants of the complainants in Catasauqua at the rates herein determined and applications looking to their establishment will be entertained by the Commission upon petitions to that effect being filed.

#### ORDER.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

Now, to wit, May 7, 1915, it is ordered: That the Pennsylvania Railroad Company, the Lehigh Valley Railroad Company, and the Lehigh & New England Railroad Company establish a through route for the transportation of coke and coal from points of origin on the line of the Pennsylvania Railroad Company in the Gallitzin, Latrobe, Connellsville, Clearfield and Latrobe, Greensburg, and Westmoreland rate groups to the plants of the Lehigh Fire Brick Works, the Bryden Horse Shoe Company, and the Crane Iron Works, in Catasauqua, as follows:

Over the line of the Pennsylvania Railroad Company to Mt. Carmel, Pa.; thence over the line of the Lehigh Valley Railroad Company to Lizard Creek Junction; and thence over the line of the Lehigh & New England Railroad Company to the above mentioned plants.

And it is further ordered: That the said railroad companies establish joint rates for the transportation of coal and coke over the said route as follows: Upon coke from Gallitzin, rate group, \$1.65 per ton, 2,000 lbs.; from Latrobe, rate group, \$1.85 per ton, 2,000 lbs.; from Connellsville, rate group, \$2.05 per ton, 2,000 lbs. Upon coal from Clearfield and Latrobe, rate group, \$1.75 per ton, 2,240 lbs.; from Greensburg, rate group, \$1.85 per ton, 2,240 lbs.; from Westmoreland, rate group, \$2.05 per ton, 2,240 lbs.

This said route and rates to become effective on or before May 17, 1915, upon five days' notice to the public and this Commission.

By the Commission,

SAM'L W. PENNYPACKER, *Chairman*.

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ADRIAN FURNACE CO. v. PENNSYLVANIA RAILROAD CO.

*Rates—Discrimination—Attempt by carrier to regulate competition—Reparation—Joint rates.*

The complainant, the Adrian Furnace Co., operates a furnace at Du Bois, Pa., from which it ships pig iron via the Buffalo, Rochester & Pittsburgh Railroad to Josephine, Pa., and thence via the Pennsylvania Railroad to Huff, Johnstown, Wilmerding, and Uniontown. A competing furnace at Josephine, on the line of the Pennsylvania Railroad, ships pig iron to the same places. Prior to 1914 the Adrian Furnace paid 50 cents per

ton from Du Bois to Josephine, sixty-seven miles, and a local rate of 55 cents from Josephine to Huff, thirty-two miles. The Buffalo, Rochester & Pittsburgh Railroad Company controls the Adrian Furnace, and the Pennsylvania Railroad, believing that the rate from Du Bois to Josephine, on the Buffalo, Rochester & Pittsburgh Railroad, was unreasonably low, filed a tariff in 1914 which allowed the local rate of 55 cents from Josephine to Huff to apply only on shipments originating at Josephine, and charged the sixth class rate of \$1.60 per ton on through shipments, thereby protecting furnaces located on the Pennsylvania line in the vicinity of Josephine from the competition of furnaces located on the Buffalo, Rochester & Pittsburgh Railroad. The complainant alleges that this tariff is discriminatory and asks reparation for shipments which moved since this tariff was filed.

*Held:* 1. The tariff complained against is discriminatory. A carrier may not differentiate between shipments or commodities according to their places of origin, nor attempt to distribute profits equitably between rival manufactories. It must carry for all at reasonable and proper rates without discrimination. If the local rate from Du Bois to Josephine is unreasonably low, the remedy is by complaint to the Commission.

2. Reparation is a return of the difference between the unjust rate paid and what is a reasonable rate. Here it was not shown that the rate from Josephine to Huff was the proper rate, and reparation cannot be awarded until that is shown in a proper proceeding.

3. The situation here calls for the establishment of a joint rate, and under the powers vested in the Commission by Article II, Section (e), Article V, Secs. 1 and 26, of the Act of July 26, 1913, P. L. 1374, the Buffalo, Rochester & Pittsburgh Railroad and the Pennsylvania Railroad are ordered to establish a joint rate between Du Bois and Huff, etc., via Josephine.

#### COMPLAINT DOCKET No. 310.

#### Report and Order of the Commission.

#### COMMISSIONER PENNYPACKER (Chairman):

The complainant corporation owns a pig iron furnace near Du Bois, in the State of Pennsylvania, situate on the line of the Buffalo, Rochester & Pittsburgh Railway Company, not a party to this proceeding. A large part of its output goes by way of Huff to Wilmerding, Pittsburgh, and Uniontown, all in the said State. The direct railroad route from Du Bois to Huff, a distance of ninety-nine miles, is over the Buffalo, Rochester & Pittsburgh Railway to Josephine, a town of about two or three thousand inhabitants a distance of sixty-seven miles, and from Josephine over the Pennsylvania Railroad to Huff, a distance of thirty-two miles.

There is a pig iron furnace belonging to another corporation at Josephine. For seven years the local rates on the Buffalo, Rochester & Pittsburgh Railway from Du Bois to Josephine upon pig iron have been per gross ton fifty cents, and upon the Pennsylvania Railroad, from Josephine to Huff, 55 cents; to Johnstown, 65 cents; to Wilmerding, 65 cents; to Uniontown, 80 cents. During these seven years the complainant shipped its pig iron by this route and at these rates. There is another route from Du Bois to Huff over the same railroads by way of Falls Creek with through rates as follows: To Huff, \$1.65; to Johnstown, \$1.65; to Wilmerding, \$1.55; to Uniontown, \$2.40. These rates were, however, regarded as prohibitive. After this long period during which the complainant sent its shipments of pig iron at the combined local rates from Du Bois to Huff, and the respondent accepted them, receiving its local rates from Josephine to Huff, the respondent filed and published a tariff to become effective February 27, 1914, which contained this provision:

"The rates named from 3494 Josephine, Pa., will apply only on shipments originating at Josephine, Pa., and not on traffic coming from points beyond."

The effect of this provision was to enable the owner of the iron furnace at Josephine to ship pig iron to Huff at the old local rate of fifty-five cents per gross ton, and to impose upon the complainant in shipping from Du Bois the sixth class rate from Josephine to Huff of one dollar and sixty cents per ton of two thousand pounds. The general freight agent of the respondent in his testimony very frankly conceded that the object in advancing the local rate from Josephine to Huff was not to secure revenue for the railroad. He testified:

Q. "And your object in advancing that rate was not to get revenue for the road?"

A. "No, sir."

Q. "It was to protect some furnace against what you thought would be ruinous or disadvantageous competition? . . ."

A. "Well, if I answer that by saying it was done to protect the rates from other furnaces on the Pennsylvania Railroad, wouldn't that answer your question?"

Q. "I suppose it would.

Mr. Ballard (counsel for respondent) "That is the fact, isn't it, Mr. Eysman?

A. "Yes, sir.

"He further said in effect that this increased rate would entirely prevent pig iron from being shipped over that route from Du Bois to Huff.

Q. "Well, you knew, didn't you, that it would be an embargo upon Du Bois iron going there, eight cents a hundred in addition to the local?

A. "Yes, sir. No pig iron could move to Huff on any such rate."

This answer would seem to indicate that shipments by way of Falls Creek were also impracticable. The fixing of a rate likely to prevent and not to encourage the shipment of freight would have been inexplicable but for certain facts which appeared in the testimony. The Buffalo, Rochester & Pittsburgh Railway Company owned all but a few shares of the stock of the Rochester and Pittsburgh Coal and Iron Company, and this latter company owned the stock of the Adrian Furnace Company. The officials of the Pennsylvania Railroad Company were apparently of the opinion that the local rate from Du Bois to Josephine of fifty cents a ton upon pig iron was an abnormally low rate, so established in order to further the interests of a furnace corporation controlled by the carrier, and that an effort was being made to get possession of a territory supplied by furnaces along the lines of the Pennsylvania Railroad. Evidence was given that complaints had been made to the respondent by such furnace corporations alleging discrimination in rates to their disadvantage. Assuming this opinion to have had a substantial basis in fact, the way of meeting the difficulty was not to make their own local rate from Josephine to Huff prohibitive, but in a proper proceeding before this Commission to show the discriminatory character of the rate from Du Bois to Josephine. That part of the tariff of February 27, 1914, which provides that the rates named therein shall only apply to shipments originating in Josephine, is plainly objectionable. It is no part of the province of a carrier to differentiate shipments or commodities according to their places of origin but

its duty is to carry all lawful freight which may be presented for the purpose, nor is it any part of the duty of the carrier to endeavor to distribute profits even justly between rival manufactories, but the full measure of such duty is to carry the commodities for all at proper and reasonable rates. To permit a furnace at Josephine to have a rate of fifty-five cents per gross ton upon pig iron to Huff, and to require a furnace at Du Bois to pay one dollar and sixty cents per net ton on pig iron from Josephine to Huff, is to discriminate in favor of the furnace at Josephine. While it is true that a joint rate may be higher than one where a single carrier transports the goods over the entire route, the difference in the present instance is too great to be so explained. For these reasons it is the opinion of the Commission that the provision of the tariff of February 27, 1914, to wit: "The rates named from 3494, Josephine, Pa., will apply only on shipments originating at Josephine, Pa., and not on traffic coming from points beyond," is unjust, unreasonable and discriminatory and ought to be eliminated.

The complainant in its petition asked further that the "Pennsylvania Railroad Company be instructed to return such excess freight as has been charged to complainant since said supplement went into effect," and the testimony fixed the amount at \$537.28. While the effect of the conclusion reached by the Commission is to leave the rates established by the tariff of February 27, 1914, in force, as to shipments originating beyond Josephine, as well as to those originating in Josephine, the Commission does not feel justified in ordering reparation upon the evidence presented. Reparation ought to be a return of the difference between the unjust rate paid and what would be the entirely reasonable and proper rate which ought to have been charged. It is not altogether clear that the local rate of fifty-five cents from Josephine to Huff is such a reasonable rate. It has been held in many cases that a joint rate may be greater in amount than the sum of the local rates charged by the different carriers whose lines make up the route. This is because there is difficulty and expense in the transfer from one carrier to another, and in other ways.

See *Iowa Commission v. A. E. R. R. Co.*, 28 I. C. C. 563. The



question of reparation remains open for further action if it be found necessary.

The questions raised by the pleadings have now been considered and determined, but this is a case which seems to demand that further steps should be taken. The real controversy is not over the rates from Du Bois to Huff and from Josephine to Huff, in amount comparatively unimportant, but have arisen over efforts upon the part of the carriers to affect the interests of shippers. Section 1 of Article XVII of the Constitution of Pennsylvania, provides:

"Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad; and shall receive and transport each the others passenger's tonnage and cars, loaded or empty without delay or discrimination."

The shipper therefore who delivers a carload of pig iron to the Buffalo, Rochester & Pittsburgh Railway at Du Bois to be transported to Huff has a constitutional right to expect that it will be carried by the Pennsylvania Railroad Company from Josephine to Huff. It is important for the interests of his business that he should have a reasonable through rate to the point of destination. The Act of July 26, 1913, provides for the establishment of such joint rates. Paragraph "e" of Section 1, Article II, P. L. 1378, directs that:

"It shall be the duty of every public service company . . . where any public service company jointly acts or participates or connects with any other public service company in the performance of service *to make* and file with the Commission when so required by it and post and publish as hereinbefore provided, the tariffs or schedules of the joint rates, prices, charges, fares or tolls, adopted or in force between them."

Under this clause it becomes the duty of the carriers when required by the Commission "to make" joint rates for the joint service directed by the Constitution. This is not the case of the establishment of a through route, but of the application of a joint rate to a through route long established and used by consent of all the parties.

Section 1 of Article V provides that :

"The Commission shall have general administrative power and authority as provided in this act to supervise and regulate all public service companies doing business within this Commonwealth."

And Section 26 of Article V provides that :

"The Commission may make such rules and regulations not inconsistent with the law, as may be necessary or proper in the exercise of its powers or for the performance of its duties."

The Commission is of the opinion after a careful consideration of all the facts, that it ought in the pursuance of the authority so given to order and require the Buffalo, Rochester & Pittsburgh Railway Company and the Pennsylvania Railroad Company to make, publish and file with the Commission reasonable joint rates upon pig iron from Du Bois to Huff, Josephine, Wilmerding, and Uniontown.

#### ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties and full investigation of the matters and things involved having been had, and the Commission, having on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof :

Now, to wit, May 7, 1915, it is ordered : That the Pennsylvania Railroad Company cease and desist from enforcing that part of Supplement No. 36 P. R. R., Order J 2265 JJ-P. S. C., Pa. No. 1, published February 27, 1914, which contains the following provision :

"The rates named from 3494 Josephine, Pa., will apply only on shipments originating at Josephine, Pa., and not on traffic coming from points beyond."

And it is further ordered : That the Pennsylvania Railroad Company and the Buffalo, Rochester & Pittsburgh Railway Com-

pany make, publish and file reasonable joint rates upon pig iron from Du Bois to Huff, Johnstown, Wilmerding, and Uniontown.

These orders to become effective on or before May 23, 1915, upon five days' notice to the public and this Commission.

By the Commission,  
SAMUEL W. PENNYPACKER, *Chairman*.

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#### PETITION OF THE CITY OF WILLIAMSPORT.

*Approval of ordinance contracts—Legality of contract—Making of contract upon specifications other than those advertised—Jurisdiction of the Commission—Acts of June 27, 1913, Art. IV, Sec. 5, P. L. 576; July 26, 1913, Art. III, Sec. 11, Art. V, Sec. 18.*

The City of Williamsport asked the approval of a contract between it and the Citizens Electric Company for supplying electric light for streets, parks, etc., in said city. Advertisements for bids for said contract were duly made but no specification or condition was made as to the length of time to be allowed for the erection of poles, wires, etc. The bid of the Citizens Electric Company was made upon the express condition that a "reasonable time" should be allowed for the erection of facilities. The ordinance passed by council accepting the bid allowed six months for the erection of said facilities.

*Held:* 1. The bid was made by the company and accepted by the city upon the above stated condition which was not included in the specifications advertised. This being the case the contract was not awarded to the "lowest responsible bidder" as required by Article IV, Section 5, of the Act of June 27, 1913, P. L. 576, and is illegal and void.

2. Under Article III, Section 11, of the Public Service Company Law, which requires the approval of the Commission for contracts between municipalities and public service companies, and Article V, Section 18, of the same act, which provides that such approval shall be given "only if and when the Commission shall find and determine that the approval of such application is necessary or proper for the service, accommodation, convenience or safety of the public," the Commission must necessarily determine administratively the legality of the contract as a condition precedent to the granting of its approval.

3. Having found and determined that the said contract was illegal and void, the Commission must refuse its approval.

4. The constitutionality of the Public Service Company Law cannot be questioned by one who seeks the approval of the Commission established by the provisions of that law.

## MUNICIPAL CONTRACT DOCKET No. 17, 1915.

## Report and Order of the Commission.

## BY THE COMMISSION :

In this case the City of Williamsport filed a petition praying that the Commission issue a Certificate of Public Convenience, evidencing its approval of a contract made with it by the Citizens Electric Company for the lighting of the streets, parks and public places of said city, for a period of ten years from the first day of December, 1914, the said contract, advertisements and bid of the Citizens Electric Company and the ordinance making provision for lighting and awarding said contract being submitted to the Commission with the said petition.

The petition states in the concluding paragraph that the petitioner "verily believes that the approval of the contract aforesaid is necessary or proper for the service, accommodation, convenience or safety of the public, prays" that the Commission "approve said contract and issue thereon a Certificate of Public Convenience . . . as provided by Article III, Section 11, and Article V, Sections 18 and 19, of the Public Service Company Law of the Commonwealth of Pennsylvania, approved the 26th day of July, 1913, P. L. 1374."

As set forth in a subsequent amendment to the first paragraph of the said petition, the petitioner, the City of Williamsport, is a municipal corporation, being a city of the third class. As such it is subject to the provisions of the recent third class city act, approved June 27, 1913, P. L. 568, "providing for the incorporation, regulation and government of cities of the third class; regulating nomination and election of municipal officers therein; and repealing, consolidating and extending existing laws in relation thereto."

Section 5 of Article IV of this act of assembly contains a provision in substance and effect like that contained in Section 6 of the Act of May 23, 1874, P. L. 230, relative to work and materials to be done and furnished for the city. It provides as follows:

"Section 5. All stationery, paper and fuel used in the council and in other departments of the city government, and all work and materials required by the city, shall be fur-

nished, and the printing, advertising, and all other kinds of work to be done for the city, except ordinary repairs of highways and sewers and other public improvements, shall be performed, under contract to be given to the lowest responsible bidder under such regulations as shall be prescribed by ordinance etc."

It appears from the said petition and accompanying exhibits that the city advertised for bids upon terms and specifications which contained no specification or condition as to the length of time to be allowed for the erection of poles, wires, etc. The bid of the Citizens Electric Company, made October 26, 1914, under this advertisement, which was accepted by the ordinance approved November 17, 1914, was upon the condition expressly set forth in said bid:

"That the Citizens Electric Company be given a reasonable period of time after contract and bond are approved to erect its poles, wires and lamps and other appliances for the successful performance of the terms of the contract."

In the contract subsequently entered into between the City of Williamsport and the Citizens Electric Company on, to wit, January 21, 1915, reference is made, as part and parcel thereof, to the ordinance of the City of Williamsport passed December 18, 1914, which, in Section 3 thereof, fixed a period of six months as the time within which poles, wires and other equipment should be erected and light furnished by the Citizens Electric Company under the said contract. Said Section 3 of this ordinance provides that:

"The Citizens Electric Company shall furnish to the City of Williamsport the light required to be furnished by it under its contract with the city, within six months from the date when said contract becomes effective according to law, etc."

Upon the face of the city's petition it therefore conclusively appears that the contract which was awarded by the city to the Citizens Electric Company and the contract which was actually made by the Citizens Electric Company with the city on January 21, 1915, contained a material term and condition which made the

contract thus entered into a different contract from that upon which, under the specifications, proposal and advertisement, the bids were invited. For this reason we are of opinion, in accordance with the contention of the counsel for the Lycoming-Edison Company, protestant, and, as expressed in the opinion given by the city solicitor of Williamsport to the council of that city, that the said contract was not "given to the lowest responsible bidder," as required by the express provisions of Section 5 of Article IV of said Act of June 27, 1913, governing the making of contracts of this character by cities of the third class, and that the contract so attempted to be made is, therefore, illegal, null and void. Under the judicial decisions interpreting the meaning and effect of the similar mandate contained in Section 6 of the Act of May 23, 1874, P. L. 230, this would seem to be clear. *Mazet v. City of Pittsburgh*, 137 Pa. 548, and *Louchheim v. Philadelphia*, 218 Pa. 100; *Ryan v. Ashbridge*, 10 D. R. 153.

The question in such a case is not whether there was actual fraud in the awarding of the contract, but whether in the specifications and proposals upon which the bids have been invited, a common standard has been fixed by which to measure the respective competitive bids, otherwise there cannot be said to be any real competition in the bidding, or an award of the contract to the lowest responsible bidder, which the statute imperatively requires. *Mazet v. Pittsburgh*, 137 Pa. 548. Whatever doubt there could be said to exist upon this point in a case where, as here, the undisputed facts show that the specifications and proposals upon which the bids were invited did not designate the time for the performance of the contract, has been set at rest by the recent decision of the Supreme Court in *Edmundson v. Board of Public Education of the School District of the City of Pittsburgh, et al.*, decided March 22, 1915. In that case the Supreme Court of the Commonwealth held, reversing the decree of the court below, that a contract made by the Board of Public Education of the School District of the City of Pittsburgh for the construction of a school building was null and void, under the provisions of Section 617 of the School Code, requiring that such contract shall be awarded "to the lowest and best bidder, etc.," because the specifications and

proposal failed to designate any date for the completion of the building.

Chief Justice BROWN, delivering the opinion of the court, said that this provision in the School Code

"Means that by due public advertisement bidders must have an opportunity of being informed of what the school district will require in awarding a contract for the construction of a school building. When bids are thus invited through due public notice, it goes without saying that bidders ought to be asked to make their bids from 'a common standard': *Mazet v. Pittsburgh*, 137 Pa. 548. All ought to bid upon exactly the same basis. Competitive bidding necessarily implies this. However far apart the bids may be all bidders propose to do the thing called for. Each proposes to do the same thing, though they may differ as to the compensation to be paid them, and all ought to bid upon exactly the same basis, if there is to be fair competitive bidding. . . . That bidders may put in their bids upon a common basis or from a common standard they should be informed, by the advertisement or the specifications on file, of (1) the quantity or amount of the work or supplies, whenever it can be specified; (2) the time within which the work is to be finished or the supplies furnished; (3) the manner in which the work is to be done; (4) the quality of the materials, if any, to be furnished; and (5) any other matter necessary to enable bidders to bid intelligently. . . . How then, can it be said that the competitive bids in this case were properly invited or properly made? If they were not invited in disregard of an express statutory requirement, they were in violation of a clearly implied one.

"The School Code provides for competitive bids, and, upon grounds of public policy and under the rules regulating the awarding of contracts by public authorities if the essential element of the time of the completion of a contract may be omitted from the specifications upon which bids are asked, there cannot be fair competitive bidding. On the other hand, by omitting the element of time from proposals, it is easy to

conjecture how the door to the perpetration of fraud may be opened. . . . If the bidders had all been put upon a common basis as to the time for the completion of the building, who can say that the school board would not have accepted a lower bid as being the best? The decree of the court below cannot be sustained. It is, therefore reversed, the bill is reinstated, and it is now ordered, adjudged and decreed that the contract made and entered into between the Board of Public Education of the School District of the City of Pittsburgh and James L. Stuart, on November 10, 1914, is illegal, null and void, etc."

The undisputed facts appearing upon the face of the city's petition and exhibits accompanying the same, thus show that the contract attempted to be made between the Citizens Electric Company and the city contains a provision which gives the Citizens Electric Company a period of six months within which to furnish the light to the city provided for by the contract, upon which essential provision the city gave no opportunity to other companies to bid in competition. It would thus seem entirely clear that the illegality of the contract is conclusively established. The finding of this Commission in re Petition of City of Pittston for approval of street lighting contract with Citizens Electric Illuminating Company, Municipal Contract Docket No. 103, 1914, ante p. 105, was predicated upon an entirely different state of facts.

If the contract is illegal and void for the reasons above stated, and if it is within the province of this Commission to so determine, the point is made by counsel for the protestant company that the Certificate of Public Convenience approving such illegal and void contract cannot, under the provisions of the Public Service Company Law, lawfully be issued by the Commission.

It is urged, however, by the special counsel for the city and by counsel for the Citizens Electric Company that the question whether or not the contract entered into by the city with the Citizens Electric Company is illegal and void, is a judicial question exclusively for the courts, and not for the Commission, to determine.

In support of this argument, attention is called to the fact that



Commission is an administrative agency and so denominated in the act by which it is established, and that under the terms of that act it is no part of the functions of the Commission to pass upon the question of the legality or illegality, under the provisions of the third class city Act of June 27, 1913, of the contract submitted for approval. With this conception of the nature and scope of the inquiry presented to the Commission by the present application we cannot agree. Under the 11th section of Article III of the Public Service Company Law, the contract submitted is invalid without the "approval" of the Commission. It would seem a contradiction, in terms, to hold that the Commission, which is the agency established by the act of the legislature for the determination of the question whether or not the contract should be approved, should be required by law to place its stamp of approval upon a contract which is made or attempted to be made by a public service company with a municipal corporation, in violation of that which the legislature of the Commonwealth has declared shall be the public policy that shall govern the making of such contract. Under the express provisions of Section 18 of Article V of the Public Service Company Law, the approval of the contract which is prayed for can lawfully be given "only if and when the said Commission shall find or determine that the granting or approval of such application is necessary or proper for the service, accommodation, convenience or safety of the public." The act thus makes it necessary for the Commission to make this finding or determination before such approval can be given.

The question whether or not the contract submitted has been made or attempted to be made contrary to the provisions of said Act of June 27, 1913, is certainly pertinent to this inquiry which the Commission must necessarily determine administratively as a condition precedent to the granting of the approval which is sought. This must be so, because if such contract has been made or attempted to be made in violation of the mandate of the act of assembly which declares the public policy of the Commonwealth with regard to the manner in which such contracts shall be made by cities of the third class, this Commission can hardly hold that it is a contract which is "necessary or proper for the service, accommodation or convenience of the public." The fact that the deter-

mination of such a question is by an agency of the government exercising administrative functions in no wise affects the power and the duty of the Commission to make it. The findings, determinations and orders of the Commission are in the exercise of a governmental authority which, in its nature, broadly speaking, pertains to the executive and legislative departments of the government, and partakes also of the characteristics of the exercise of judicial functions. In reaching such determinations and in making such orders, it is, of necessity, called upon to exercise, incidentally, functions which are quasi-judicial in their nature, and to pass upon questions of law of the kind, at least, which is involved in the present application. *Reagan v. Farmers' Loan and Trust Co.*, 154 U. S. 362; 38 L. Ed. 1014; *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210; 53 L. Ed. 150; *Louisville & Nashville R. R. Co. v. Garrett*, 231 U. S. 298; 58 L. Ed. 229. Regulation upon any other principle of administrative action would be largely nugatory.

In *West Jersey and Seashore Railroad Company v. Board of Public Utility Commissioners of New Jersey* (opinion of Court of Errors and Appeals of New Jersey, April 22, 1915), the only question argued by counsel was whether the commission had the power, under the Public Utilities Act, to disapprove, as it did, the lease of a railroad property and franchises upon the ground that in the judgment of the Commission the lease "would be inimical to the interests of the state and its citizens." The power of the board to disapprove the lease if it were made contrary to the provisions of the New Jersey statutes was not doubted. On the contrary, counsel for the appellant contended (to quote from the opinion of the court) "that the limit of the power of approval thus conferred is to determine 'whether the conditions exist under which the statute authorizes a lease to be made, and whether the statutory procedure with relation thereto has in all respects been followed.'"

The determinations and orders of the Commission are subject to judicial review upon appeal and may be reversed by the appellate courts if not made "in conformity with law," or the record remanded to the Commission for the correction of any legal error. (Article VI, Section 24, Public Service Company Law.)

However much for the service, accommodation and convenience of the public the approval of this contract might otherwise, upon investigation and the taking of testimony, prove to be, a Certificate of Public Convenience approving the contract cannot be issued since the contract violates the plain mandate of the Act of June 27, 1913, declaring in effect that a contract attempted to be made, as was the present one, is not proper for the public convenience, under the public policy of the Commonwealth. The latter act of assembly and similar legislation governing the making of contracts by municipalities is neither expressly nor impliedly repealed by the Public Service Company Law. The latter statute nowhere, of itself, prohibits competition between public service companies, although a discretion is vested in the Commission to regulate such competition, under the various provisions of said act: *Penna. Utilities Co. v. Lehigh Navigation Electric Co.*, 18 Dauphin County Reports 146, ante p. 74. See also the reports of this Commission in *Slate Belt Telephone & Telegraph Co. v. Blue Mountain Telephone & Telegraph Co.* (Application of Blue Mountain Telephone & Telegraph Company for Certificate of Public Convenience), Complaint Docket No. 156, ante p. 403; Application of Raystown Water Power Company for approval of contract with Borough of Mount Union, Municipal Contract Docket No. 388, 1914, ante p. 483. See also Report of New Jersey Commission in re Petition for approval of ordinance granted to Phillipsburg's Light, Heat and Power Co. (Feb. 3, 1914).

In the exercise of a sound legal discretion, after investigation and hearing, the Commission may determine that a contract, though concluded by a public service company with a municipality, in full conformity with the provisions of legislation requiring competitive bidding as a condition precedent to the making of the contract is, nevertheless "not necessary or proper for the service, accommodation, convenience or safety of the public." (Section 18, of Article V of the Public Service Company Law.) *U. S. v. Atchison, T. & S. F. R. Co.*, 234 U. S. 476; 58 L. Ed. 1048; *West Jersey and Seashore R. R. Co. v. Board of Public Utility Commissioners* (Court of Errors and Appeals of New Jersey, April 22, 1915), *supra*. The legislation above mentioned, governing the making of contracts by municipalities, is, to that extent, modified

so far as the making of contracts with public service companies is concerned, but there is no warrant for holding that the Act of June 27, 1913, or similar legislation, has been impliedly repealed by the Public Service Company Law of July 26, 1913, and is no longer in force or effect. *Erie v. Bootz*, 72 Pa. 196 (Sharswood, J.); *Lutz's Case*, 8 Pa. C. C. 133 (Endlich J.); *Sifred v. Commonwealth*, 104 Pa. 179; *Hendrix's Account*, 146 Pa. 285; *Commonwealth v. Vetterlein*, 21 Super. Ct. 587.

In the exercise of the discretion vested in the Commission to determine whether or not a contract of the nature of the present one, made by a municipality with a public service company, to light the streets of the municipality, or for the performance of some other service which the municipality itself has the right to perform (See Report of the Commission in re Application of the Borough of Gettysburg for approval of the construction and operation of an electric plant for lighting the streets of the borough, No. 298 Application Docket, 1914, ante p. 331), due weight is to be given to the fact that the municipality itself might perform the service in question under its unrestricted local governmental authority so to do. Were it not that the contract submitted in the present case has been made contrary to the public policy of the Commonwealth as declared by said Act of June 27, 1913, the consideration last above mentioned would be duly taken into account.

The City of Williamsport, in the brief filed with the Commission by its special counsel, in addition to denying the illegality of the contract and denying the jurisdiction of the Commission to pass upon such question of legality or illegality, makes the further claim to the Commission that the provisions of the Public Service Company Law, under which the city's petition for the approval of the contract is filed, are unconstitutional and void. In this branch of the argument the city is in the anomalous position of claiming that the very jurisdiction which it requests the Commission to exercise, cannot be exercised because it is null and void, as contravening the limitations placed by the State Constitution upon the legislative power. The city, by the filing of the petition, invoking the exercise of the jurisdiction to approve the contract, necessarily asserts the constitutional existence of that jurisdiction,

which latter in the next breath, it denies, though it does not withdraw its said petition.

Under these circumstances we do not think that upon any proper principle of administration such complaint of unconstitutionality could be entertained, even if it could otherwise properly be held to be competent for the Commission to assert the unconstitutionality of any provision of the very act of the legislature which created it. Complaints against the constitutionality of an act of the legislature are not entertained even by the courts under like circumstances: *Southern Railroad Co. v. King*, 217 U. S. 524; 54 L. Ed. 868; *Engel v. O'Malley*, 219 U. S. 128; 55 L. Ed. 128.

The authorities, however, appear clearly to fully support the opinion that the provisions of the Public Service Company Law referred to by the special counsel for the city, or by the counsel for the Citizens Electric Company, who also filed a brief with the Commission, are not unconstitutional, for any of the reasons assigned by them. *Eastern Telephone and Telegraph Co. v. Board of Public Utility Commissioners of New Jersey*, 89 Atlantic Reporter 924, and decision of the Supreme Court of New Jersey, afterward affirmed by the Court of Errors and Appeals of that state, and *West Jersey and Seashore Railroad Co. v. Board of Public Utility Commissioners of New Jersey*, *supra*. *Atlantic Coast Line R. Co. v. North Carolina Corp. Com.*, 206 U. S. 1; 51 L. Ed. 933; *Union Bridge Co. v. U. S.*, 204 U. S. 364; 51 L. Ed. 523; *Monongahela Bridge Co. v. U. S.*, 216 U. S. 177; 54 L. Ed. 435; *U. S. v. Grimaud*, 220 U. S. 506; 55 L. Ed. 563; *Louisville & N. R. Co. v. Garrett*, 231 U. S. 298; 58 L. Ed. 229; *U. S. v. Atchison T. & S. F. R. Co.*, 234 U. S. 476; 58 L. Ed. 1409.

For the above reasons the Commission finds and determines that the approval of said contract is not proper for the service, accommodation and convenience of the public, and withholds its approval thereof. The petition of the City of Williamsport for a Certificate of Public Convenience, evidencing the approval of said contract, will be dismissed.

An order will be entered accordingly.

#### ORDER.

This case being at issue upon petition and protest on file, and

having been duly heard and submitted by the parties and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

Now, to wit, May 7, 1915, it is ordered: That the prayer of the petition be and the same is hereby refused and the petition dismissed.

By the Commission.

SAM'L W. PENNYPACKER, *Chairman*.

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#### ADMINISTRATIVE RULING No. 7.

*In the matter of the sale of commutation and term tickets on or before the date of the initial trip.*

In order that all purchasers of monthly, quarterly, or other forms of commutation and term tickets, not including five-hundred-mile and one-thousand-mile tickets, may obtain the full benefit of the limit during which such tickets are valid, and for the further convenience of passengers using such forms of tickets to or from non-agency stations, they shall be sold, upon application, at least one day in advance of the date the initial trip is to be made.

If the initial trip is to be made on Monday, such tickets may be purchased on the preceding Saturday or Sunday.

In applying for a ticket of this description, the purchaser must declare the date upon which such initial trip is to be made, which date should be prominently shown on ticket, accompanied by a statement indicating that ticket will not be valid prior to the date of such initial trip, as indicated.

Necessary corrections to existing tariffs may be made by supplements or reissues upon five days' notice to this Commission, which tariffs or supplements should indicate that such issue is made "By authority of The Public Service Commission of the Commonwealth of Pennsylvania, Administrative Ruling No. 7, of April 9, 1915."

A. B. MILLAR, *Secretary*.

*April 9, 1915.*

## COUNTY COURT OPINIONS

### LOCOMOBILE COMPANY OF AMERICA v. MALONE.

*Foreign corporations—Conditions precedent to doing business—Registry in office of auditor general—Acts of June 1, 1889, P. L. 420, Sec. 19; May 8, 1901, P. L. 150; June 8, 1911, P. L. 710.*

The Act of June 8, 1911, which requires registration of a foreign corporation in the office of the secretary of the Commonwealth, supplies the provisions of Section 19, Act of June 1, 1889, P. L. 420, and of the Act of May 8, 1901, P. L. 150, in so far as the latter prescribe conditions precedent to the doing of business by a foreign corporation.

A foreign corporation that avers compliance with the Act of 1911 has a prima facie right to sue to recover upon a debt contracted in the transaction of business in this State.

Note: See also ante p. 439 and p. 570.

Demurrer to Statement of Claim. C. P. Allegheny County, No. 700 April Term, 1915. Docket "D." In the motion for reargument counsel for the defendant requested affirmance by the court of the following point:

"Where it affirmatively appears in the Statement of Claim in an action by a foreign corporation that it is doing business in the State, and that the cause of action is based upon a contract made within the State, the Statement of Claim is demurrable unless it alleges compliance with the several acts of assembly of this Commonwealth, which require certain *conditions precedent* to be performed before the company is authorized to do business in this State, said acts of assembly being the 19th section of the Act of June 1, 1889, P. L. 420, and the Act of May 8, 1901, P. L. 150."

*Evans, Noble and Evans*, for plaintiff.

*George M. Hosack*, for defendant.

CARPENTER, J., May 8, 1915.

This cause was heard on demurrer to plaintiff's Statement of Claim and after full and able oral argument, supplemented by exhaustive briefs, the conclusion was reached that the demurrer should be overruled. (See 2 P. C. R. 570; 63 P. L. J. 179.)

Defendant's counsel subsequently filed a motion for reargument upon Section 19 of the Act of June 1, 1889, P. L. 420, and the Act of May 8, 1901, P. L. 150. It is conceded by counsel for defendant that the Acts of 1889 and 1901 are not repealed by the Act of June 8, 1911, P. L. 710, and he contends that the logical consequence is that plaintiff having failed to aver compliance with the requirements of said acts, although it averred compliance with the Act of 1911, the statement of claim is, in its present form and substance, fatally defective. We adhere to the opinion that these acts are not repealed. That Section 19 of the Act of 1889 and several of the provisions of the Act of 1901 are supplied by the Act of 1911 seems clear. Real or apparent inconsistency between certain provisions of acts does not operate to repeal earlier acts *in toto*, but in so far as the provisions of the earlier are supplied by the later, the earlier must give way. The Act of 1911 is neither inconsistent with, nor does it supply the provisions of former acts in relation to revenue.

The Act of 1911 regulates the entrance of, and the transaction of business by, foreign corporations desiring to do business in this State. The manifest purpose of acts of assembly must be considered in determining the effect of one upon the other; words do not always control.

The first section of the Act of 1901 refers to the payment of bonus and was intended to subject foreign corporations to the same burdens which the law imposed upon domestic corporations.

The primary purpose of both the acts—1889 and 1901—was to increase the revenues of the State. That both prescribed methods deemed most effective for accomplishing this result can not be doubted and were doubtless regarded as efficient for that purpose. *Expressio unius exclusio alteriores*, and when the legislature of 1911 saw fit to say that "Every such foreign corporation before doing any business in this Commonwealth, shall appoint in writing, the secretary of the Commonwealth and his successor in office to be its true and lawful attorney and authorized agent, upon whom all lawful process in any action or proceedings may be served"; and then specified that the power of attorney must show the title and purpose of the corporation, the location of its principal place of business in the Commonwealth and the post of-



fice address to which notices could be sent, it did all that was deemed necessary to give effect to the constitutional provision in relation to the doing of business by foreign corporations, within this Commonwealth. The payment of a bonus of one-third of one per centum as provided by the first section of the Act of 1901 is not made a prerequisite to the right to do business in this State.

That the nineteenth section of the Act of 1889 and second section of the Act of 1901 do prescribe conditions precedent, terms upon which the right to "go into operation" (1889) the right to "go in operation or transact business" (1901) shall depend, can not be disputed. But the Act of 1911 says that "*before doing any business*" foreign corporations must comply with certain requirements specified, and we must conclude that compliance with the terms imposed gives the right to enter the State and engage in business, and especially so when the original act (1874) is repealed, and the conditions prescribed by the Act of 1911 differ from those of the other acts relating to the same subject. For, whilst the last act omits several of the requirements of the two preceding acts it exacts sufficient information to enable the proper officers to get all the data necessary to assess taxes payable to the Commonwealth and brings foreign corporations within the reach of legal process, thus accomplishing the primary purpose of the Constitution and laws of the State in respect of these matters.

The Act of 1901 has no doubt served its purpose so far as payment of bonus by foreign corporations then in the State are concerned, and is still in force. At the time of its adoption certain information was necessary to make it effective and the legislation was framed to meet the real or supposed necessities. That the legislature has since deemed it wise to simplify the method by which, and the terms and conditions under which, foreign corporations may enter the State and engage in business, without in anywise impairing the power of the State to exact tribute for the privilege conferred, may be presumed. In any event it has prescribed new and easier terms of entrance and the plaintiff having complied therewith has at least a *prima facie* right to sue for the recovery of a debt alleged to be due. We are not convinced that the order overruling the demurrer should be vacated.

**COMMONWEALTH v. ST. CLAIR COAL COMPANY.***Tax on anthracite coal under Act of June 27, 1913, P. L. 639.*

Note: This opinion contains the essential facts upon which the objections raised in this case, the case of *Com. v. Plymouth Coal Co.*, 112 Commonwealth Docket, 1914, and *Com. v. Alden Coal Co.*, 65 Commonwealth Docket, 1914, rest. For discussion of the principles involved see the opinion in *Com. v. Alden Coal Co.*, immediately following.

*Wm. M. Hargest*, Asst. Deputy Atty. Gen., for Commonwealth.

*Everett Warren*, *F. W. Fleitz*, and *F. A. Wheaton*, for defendant.

KUNKEL, P. J., April 30, 1915.

The defendant has appealed from the settlement made by the accounting officers of the Commonwealth under the Act of June 27, 1913, P. L. 639, against it for the tax on anthracite coal which it mined and prepared for market during the period beginning June 28, 1913, and ending December 31, 1913. The appeal has been submitted to us for trial without a jury. We find the facts to be as follows:

**FACTS.**

1. The defendant company is a corporation chartered under the laws of this State, having the right to own and lease coal lands, and to mine, prepare and sell coal. It operates a colliery on leased land in Schuylkill County, and it prepares for market and sells in the State of Pennsylvania large quantities of anthracite coal mined from the property leased by it.

2. On the first day of January, 1914, it made its report to the auditor general that it had prepared for market during the period covered by this settlement 124,956 tons 17 cwt. of anthracite coal of the value of \$310,792.75. Pursuant to this report the accounting officers of the Commonwealth on June 30, 1914, settled the present account against it, in which it was charged with the tax of \$7,769.81, being 2½% on the reported tonnage and value.

3. In accordance with the provisions of the Act of April 9, 1913, P. L. 48, the defendant presented its petition under oath,

praying for a resettlement of the account, which was refused, whereupon it took this appeal.

4. Of the 124,956 tons 17 cwt. mined and prepared for market, 66,040 tons 13 cwt. of the value of \$169,978.99 had on December 31, 1913, been sold and shipped permanently out of this State and no part of it was on that date or thereafter in this State. The remaining 58,916 tons 4 cwt. of the value of \$149,813.76 was during the period covered by this settlement sold and shipped to points in this State.

5. Anthracite coal is found only in eight counties in the State, while bituminous coal is found and produced in large quantities in upwards of thirty of the counties of the State.

6. Anthracite coal, semi-anthracite coal, semi-bituminous coal and bituminous coal differ in per centage of the fixed carbon therein and the uses to which they are applied are similar.

7. Many of the municipalities of the eight counties affected by this act will under its provisions for distribution of the tax receive more money than they are at present receiving for governmental purposes by local taxes levied, and in some instances the amount so received from this tax will exceed their present municipal expenditures, and certain municipalities will receive a share of the tax although no coal is found therein.

8. Defendant is required to pay annually to the Commonwealth a tax upon the value of its capital stock, and in the valuation of its capital stock for the year 1913 was included the anthracite coal mined and prepared for market by it during the period covered by this settlement.

9. Evidence was offered to the effect that the Act of June 27, 1913, under which the settlement was made, was not published as required by the Constitution in cases of special or local legislation.

#### DISCUSSION.

The objections to the present settlement are overruled, and our reasons therefor are stated in the opinion filed this day in the case of *Commonwealth v. Alden Coal Co.*, No. 65 Commonwealth Docket, 1914, to which opinion we refer so far as it relates to the discussion of the objections raised here. The conclusions reached

thereon in that case are made part hereof, and are filed herewith. See Exhibit "A." [See case immediately following.]

### CONCLUSION.

Wherefore we conclude the Commonwealth is entitled to recover, as follows:

Tax on settlement, .....	\$7,769.81
Interest from August 30, 1914, .....	776.98
	<hr/>
	\$8,546.79
Attorney general's commission, 5%, ..	427.34
	<hr/>
Total amount, .....	\$8,974.13,

for which sum judgment is directed to be entered in favor of the Commonwealth and against the defendant unless exceptions be filed within the time limited by law.

### COMMONWEALTH v. ALDEN COAL COMPANY.

*Constitutional law—Title of act—Local or special legislation—Double taxation—Due process of law—Act of June 27, 1913, P. L. 639.*

Upon the question of the constitutionality of the Act of June 27, 1913, P. L. 639, it was

*Held:* 1. The act deals with one general subject only, the taxation of anthracite coal. The provisions for the collection and disposition of the tax relate to that subject.

2. The penal provision in the act is auxiliary to the collection of the tax and specific notice of it in the title is not necessary.

3. Although the act does not expressly require the operator to pay the tax, the evident legislative intention is that he shall, and that intention will control.

4. A taxing act is not local or special legislation if it operates in every county where the subject of the tax is found. It is not necessary that the subject of the tax be found in every county in the State.

5. The intention of the legislature expressed in the act is plain, and the fact that double taxation may result by including the value of the coal as part of the value of the capital stock of an operating company, will not invalidate the act.

6. The classification of anthracite coal for taxation is a legitimate one and is not in violation of Sections 1 and 2 of Article IX of the State Constitution nor of the fourteenth amendment of the Federal Constitution.

7. Although the distribution of the proceeds of this tax may relieve certain municipalities from the necessity of imposing taxes, the act does not exempt the persons or property therein from taxation and does not violate Section 2 of Article IX of the State Constitution.

8. Because the tax is paid by the operators and part of the proceeds is turned over to certain municipalities, the act cannot be said to take property without due process of law. The purpose of the tax being a public one, the legislature had the power to levy the tax and the distribution thereof is alone within its control.

9. Under the provisions of the act the coal is subject to the tax when it is prepared for market and its valuation is to be made at that time. This valuation is equivalent to an assessment and the fact that the coal is sold or removed from the State before the report is made at the end of the year does not relieve the operator from liability for tax thereon.

Appeal from settlement for tax on anthracite coal. C. P. Dauphin County. No. 65 Commonwealth Docket, 1914.

*John C. Bell*, Attorney General, and *Wm. M. Hargest*, Asst. Deputy Attorney General, for Commonwealth.

*Olmsted & Stamm*, for defendant.

KUNKEL, P. J., April 30, 1915.

This is an appeal from the settlement by the accounting officers of the Commonwealth against the defendant for the tax on anthracite coal which it mined and prepared for market during the period beginning June 28, 1913, and ending December 31, 1913. It has been submitted to us for trial without a jury. We find the facts to be as follows:

#### FACTS.

The defendant is a corporation of this State and operates only in Luzerne County, where it mines and prepares anthracite coal for market. On June 30, 1914, pursuant to its report to the auditor general made January 31, 1914, the present account was settled against it, in which it was charged with a tax of \$7,792.86, being two and one-half per centum on 137,017.8 tons of coal prepared for market, of the value of \$311,714.42. It presented its

petition for a resettlement, in accordance with the provisions of the Act of April 9, 1913, P. L. 48, which was refused. Whereupon it took this appeal.

Before it made its report of the number of tons of coal prepared for market and the value thereof, and before this settlement was made against it, it had sold the coal and was no longer the owner thereof, and of the 137,017.8 tons of coal, 103,018.9 had been shipped out of the State. These we think are the material facts. There are, however, other facts which we have found and which appear by our answers to the Commonwealth's and defendant's requests for findings of fact filed herewith.

#### DISCUSSION.

The Commonwealth's claim for the tax in dispute rests upon the Act of June 27, 1913, P. L. 639. By Section 1 of the act every ton of anthracite coal prepared for market in this Commonwealth is made subject to a tax of two and one-half per centum of the value thereof, the tax to be settled and collected as provided by law for other State taxes. By Section 2 every operator of an anthracite coal mine or mines in the State is required to report in writing and under oath to the auditor general, in the month of January in each year, the number of tons of anthracite coal mined by him or it within the calendar year then next preceding, and the value thereof prepared for market. By Section 3 the failure to report within the time required is visited by a penalty of ten per centum on the tax; and an intentional failure to make the report is declared to be a misdemeanor, punishable, upon conviction, by fine or imprisonment. By Section 4 an appeal is given to the operator from the settlement of the account for the tax. By Section 5 it is provided: "Each county shall receive from the state treasurer, for the use of the several cities, boroughs and townships thereof, one-half of the said tax collected from operators in said county; and the treasurer thereof shall, within thirty days thereafter, pay over the same to the treasurers of the several cities, boroughs and townships in said county pro rata, according to their respective populations as shown by the last preceding United States census." Many objections have been raised to the

validity of this statute, which we will consider as briefly as possible.

1. The statute is assailed on the ground that it contains more than one subject, that its title is defective, and that in these respects it violates Section 3 of Article III of the Constitution. In *Booth & Flinn v. Miller*, 237 Pa. 297, it was said: "It is not an infringement of Article III, Section 3, of the Constitution, if there are several provisions in a bill, providing they are connected with and germane to the one general object of the legislation. It is sufficient if they relate to and are a means of carrying out the one general provision of the act." And in *Commonwealth v. Powell, et al.*, appealed from this court, and affirmed by the Supreme Court but not yet reported, it was said: "No argument should be required to show that provision for attaining various objects which relate to the general subject of a bill may be dealt with, by its terms, without laying it open to the charge of containing more than one subject." The general subject of the present act is the taxation of anthracite coal. The provisions for the collection and disposition of the tax relate to that subject. They cannot be viewed as other subjects under the doctrine above stated.

The objection that the title of the act is defective because there is no notice given therein of the penal provision for failing to make the required report is not tenable. The report is an important step toward collecting the tax. The penal provision is the means of enforcing the production of the report. It is auxiliary to the collection of the tax of which notice is given in the title. It is necessarily covered therefore by such notice. The high license law entitled "An act to regulate and restrain the sale of . . . liquors" contains penal provision for its enforcement, but no notice thereof is given in the title. No one ever successfully questioned the sufficiency of that title, although there is no specific or express notice given therein of the means provided for enforcing it. Many other instances of like kind might be cited, but this we think is sufficient.

2. It is further objected that the act does not require the defendant to pay the tax. It is true there is no express requirement that the operator shall pay, and in this respect the act is crudely drawn, but an examination of its provisions leaves no

doubt of the legislative intention. The operator who prepares the coal for market is required to report the number of tons mined and the value thereof, the accounting officers are authorized to settle the account for the tax, and the operator is given the right to appeal from the settlement. Why give him the right to appeal if he is not interested in the account and the account is not against him and if he is not to pay? That it was the intention of the legislature that he should pay is, we think, manifest.

3. We have carefully examined and considered the proposition that the Act is local and special legislation, but we are not able to agree with it. The act imposes a tax on anthracite coal. It in no way purports to legislate for any particular locality. The fact that anthracite coal is now found in only nine counties of the State does not render it a local act. Anthracite coal may be found in other counties in the future, but even if this be not so, an act is not local which operates in every county of the State where the subject of the tax is found. There is no indication that the act was not passed in good faith or was passed to avoid the constitutional inhibition against local or special legislation. The authorities cited by the defendant in support of this objection have no application to the present case. Those were cases where the legislation in terms referred to counties and other municipal divisions of the State, and a law that applied to some and not to others was of course held to be a local law and violative of the Constitution; or where the counties or divisions mentioned in the legislation were so described as to embrace some counties or divisions of the State and not others, in which event the law was declared to be local. In the case before us, however, there is no attempt to legislate for any counties, cities, boroughs, etc. The act refers to anthracite coal and its taxation. If it referred to all coal the same objection could be made against it, because in many counties of the State no coal of any kind is to be found.

It is further argued that the act is a local law regulating the affairs of counties, cities, etc., and violates Section 7 of Article III of the Constitution. We fail to understand how it can be said to regulate the affairs of counties, cities, boroughs, etc. As we have said, it does not purport to refer to counties or any municipal division of the State. It makes no attempt to regulate the tax



of any such division. It imposes a tax for State purposes. On its face it deals with a State affair. It is nothing more nor less than legislation for the purpose of raising State revenue. If it is to be condemned as a local act regulating the affairs of counties, etc., it follows that the legislature may not subject to taxation any property unless it be found in every county in the State, a proposition not to be entertained for a moment, and one, the mere statement of which is its own refutation.

Again, if it be considered a local act, although not regulating the affairs of counties, such as may be enacted by proper publication, then it amounts to this, that the legislature may not subject to taxation any property unless such property be found in every county in the State, without publication in conformity with the constitutional requirement.

Furthermore, if it be suggested that the act is local and special legislation because the distributive section, Section 5, applies only to the cities, boroughs and townships, in the counties in which the coal is mined, we can only say we are not aware of any obligation on the part of the legislature to give notice by publication, *before* passage, of every bill by which the State revenues are distributed or by which appropriations are made therefrom to specific objects. If this be the law it has never been observed, and failure to observe it is a strong argument against the defendant's position. Nor have we been referred to any authority which holds that such a law is a regulation of the affairs of counties, cities, etc., in violation of the constitutional prohibition.

4. The objection that the coal here taxed was represented in the capital stock of the defendant, on which it paid or will pay a capital stock tax, and that therefore the act imposes double taxation, is not necessarily a fatal objection. Whether a double taxation is imposed by the act is quite immaterial. The power of the legislature to impose double taxation is well settled. The only question here is whether the legislature so intended. It must be presumed that the legislature knew that the coal taxed by this act might be included in the valuation of the capital stock for the capital stock tax, and if it knew this and passed the present statute with that knowledge, it is quite plain it intended to impose double taxation. But the coal taxed by the act might or might not be

included in the valuation of the capital stock. That would depend upon whether or not it was in the State or owned by the defendant during the period from November 1st to November 15th of the year for which the tax was settled. Within that period the appraisement of the capital stock for State taxation is required to be made. *Corn. v. Railroad Co.*, 145 Pa. 74. If the coal was not owned by the operator or was not in the State during that time it could not properly be included in the appraisement of the capital stock, *Penna. v. Delaware R. R. Co.*, 198 U. S. 341, in which case there would not be double taxation. It is manifest, therefore, that it is in the power of the operator, by disposing of the coal before the period beginning November 1st and ending November 15th in each year, or by removing it from the State before that period, to readily avoid the double taxation which is made the basis of this complaint. We do not think the complaint has any real merit, as the double taxation does not necessarily result from the legislation and may be avoided by the act of the operator.

But it is said that the coal mined by the defendant during the period covered by this settlement was included in the valuation of its capital stock for State taxation. If the coal was outside of the State between November 1 and November 15, 1913, its value may be properly deducted from the total valuation of the capital stock and thus it will not be subjected to the capital stock tax. If the coal was not owned during that period it cannot be said to have been included as coal in the valuation of the capital stock. What is complained of in the present case may occur occasionally, but does not, as we have said, necessarily follow from the provisions of the act. The fact that the coal owned by a corporate operator may, under circumstances exclusively within its control, be taxed through its capital stock, while the coal owned by an individual operator is not so taxed, would not warrant us in declaring the act unconstitutional and void.

5. It is further contended that the act in question is in conflict with Sections 1 and 2 of Article IX of the State Constitution and of the Fourteenth Amendment of the Federal Constitution, because it imposes a tax on anthracite coal and not on coal generally. It is argued that coal may not be classified for taxation as anthracite coal and all other coal be exempted from the tax under these

constitutional provisions, and that such a tax is not uniform. If the classification be allowable the objection of the lack of uniformity and the resulting exemption complained of must fail. Necessarily the classification of property or persons for taxation, and the subjection of the members of a class and the property within the class to taxation, excludes or relieves from such tax all property or persons not embraced in the class. This is not the kind of exemption, however, against which Section 2 of Article IX is directed.

On the question of the right of the legislature to classify for the purposes of taxation, the authorities are numerous and need not be referred to at length. We think it is sufficient to refer only to the case of *Knisely v. Cotterel*, 196 Pa. 614, where quoting from *Seabolt v. Commissioners of Northumberland County*, 187 Pa. 318, it is reiterated: "Classification is a legislative question, subject to judicial revision only so far as to see that it is founded on real distinctions in the subjects classified, and not on artificial or irrelevant ones used for the purpose of evading the constitutional prohibition. If the distinctions are genuine the courts cannot declare the classification void though they may not consider it to be on a sound basis. The test is not wisdom but good faith in the classification." It is quite clear that the distinction between anthracite coal and other kinds of coal is not a factitious one. It has arisen among those who have mined, dealt in and used coal. It is a distinction so common as to be recognized the world over. The classification of anthracite coal, therefore, as a subject of taxation cannot be said to be artificial, or may not justly be subjected to the charge of being used for the purpose of evading the Constitution. What the legislature did in enacting the present statute was but to adopt a distinction already existing respecting the property made subject to the tax. The same distinction has been recognized by the legislature and sustained with respect to the business of mining anthracite coal and of mining bituminous coal. Act of June 2, 1891, *Durkin v. Kingston Coal Co., et al.*, 171 Pa. 193; Act of May 15, 1893, *Com. v. Jones*, 4 Super. Ct. 362. The limit to which classification for the purpose of taxation has been sustained may be found in *Com. v. Del. Div. Canal Co.*, 123 Pa. 594; *Com. v. Germania Brewing Co.*, 145 Pa. 83; *Com.*

v. Mortgage Trust Co., 227 Pa. 163; and Com. v. L. V. R. R. Co., 244 Pa. 241.

What we have said applies as well to the objection that the act violates the Fourteenth Amendment of the Federal Constitution. All that is required under its provisions is that classification be reasonable and not arbitrary and be made in good faith. *Magoun v. Ill. Trust & Savings Bank*, 170 U. S. 283, and the authorities there cited.

The difficulty in some instances to differentiate between anthracite coal and semi-anthracite or semi-bituminous coal can have no effect on the question of classification. Whether or not the particular coal sought to be taxed in a given case is anthracite and falls within the act must necessarily depend upon the facts of such case.

We are of the opinion that the classification of anthracite coal for taxation is a legitimate one and that the taxation of such coal as distinguished from all other kinds of coal is not a violation of the constitutional provisions referred to.

6. By Section 5 the tax, when collected, is distributable to the cities, boroughs and townships in the several counties where the coal is mined. The result of this distribution will be to give annually to some of these municipal divisions sums of money equal to, and in some cases greater than, their total municipal expenditures, thus relieving them in part, and possibly in whole, from local taxation. This also, it is contended, is in violation of Sections 1 and 2 of Article IX of the State Constitution, which provides for uniformity of taxation, and declares void all laws exempting property from taxation other than the property enumerated therein. The citizens of these municipalities will, however, still be subject to some local taxation and to taxation for State purposes. If so, the relief they will receive from the tax is not prohibited. These constitutional provisions have no application to the condition which may arise from the enforcement of the present statute. *Hawes Mfg. Co.'s Appeal*, 1 Monaghan 353; *Com. v. Brewing Co.*, 145 Pa. 83.

7. Even if all the objections thus far raised to the act prove ineffectual to destroy it, the further objection is urged upon us that as Section 5 distributes one-half of the tax to the several

municipalities of the counties wherein the coal is mined, the defendant's property will thus be taken and given over to others, and thereby it will be deprived thereof without due process of law. We do not take this view of the case. The act is a measure to raise revenue and at the same time provides for the distribution of the funds so raised to certain municipalities. If the purpose for which the tax is levied is a public one there is no doubt of the power of the legislature to impose the tax. One-half of it is to be used for the State generally. The other half the State proposes to pay over to certain municipalities. To pay money to its municipal divisions seems to us to be using it for a public purpose. These municipalities are the creatures of the State, erected by the legislature for the purpose of administering, and clothed with the power to administer, public affairs in their respective localities. They represent the State. It must be conceded that the State may authorize them to levy taxes to meet the expenses of administering their local government. If so, why may it not also take out of its general revenue, no matter how raised, and give to them in aid of what they are doing in representing the State? This the State has frequently done. It has distributed for years from its revenues to the several school districts. It distributes out of the same revenue to charity and benevolence. It has divided with the counties the tax on personal property which it collected. It distributes to the several counties and townships from its general revenues in aid of the public highways. It appropriates one-half of the tax on premiums of foreign fire insurance companies to the several municipalities of the Commonwealth. Act of June 28, 1895, P. L. 408. Other instances of the same kind might be cited. Who is to direct how the State revenues raised by taxation are to be distributed or disposed of? This is a question as to which the courts agree. It is exclusively for the legislature, bound only by such restrictions as are placed upon it by the organic law. It is a power the exercise of which the judiciary have no right to revise. If Section 5 stood as a separate act, distributing the taxes raised under the act in question, what standing would the defendant have to complain? The statute does not present the case where the property of one is taken and applied to the use and benefit of another, but presents

the case where property is taxed by the Commonwealth and the revenues thus raised are distributed where, in the judgment of the legislature, seems right and proper. In *State v. Western Union Telegraph Co.*, 73 Maine 518, under a statute of that state, telegraph companies were required to pay into the state treasury a tax of two and one-half per centum on the value of their property within the limits of the state. The tax thus raised was directed to be distributed to certain towns in the state in the proportion which the number of shares of stock of the company owned in the town bore to all the shares owned in the state. The remainder of the tax was to be retained for the use of the state. The effect of this provision was to give the revenue so raised to three towns of the state, whereby the tax of every individual in the three towns was ratably diminished. The same objection to the validity of the statute was made there as is made here, that it took the property of some citizens and used it for the benefit of others. To this objection it was said by the court: "It is objected in this case that the distribution of this tax as provided in the act shows that it is not for a legitimate purpose. What distribution is contemplated is somewhat difficult, perhaps impossible, to ascertain from the act itself. If it is all to go to the towns it would still be a public purpose. But that is not the matter which is now involved. The tax is now imposed by the state and is to be paid to the state treasurer as other public funds. It then becomes a public fund to be used for public purposes. If diverted from that the remedy is not by refusal to pay. If the last section of the act should prove to be a violation of the constitution or void for uncertainty, it does not affect the remainder. This is not a case where one district is required to pay the tax for the support of another. It is like one excise tax raised in any part of the state, to be appropriated by the state wherever its needs or its sense of justice may require."

The purpose of the present taxation being a public one, the legislature possessed the power to levy the tax and the distribution thereof is alone within its control.

8. A further objection to the recovery by the Commonwealth on this settlement is that the coal reported by the defendant, upon which the value of the tax is computed, was not owned by it at

the time the report was made, nor at the time the settlement was made against it, and that when it made its report a great part of the coal was outside of the State and beyond the taxing jurisdiction of this State. This objection is based upon what we think is an erroneous construction of the act. The tax is levied by the act. The rate is fixed by the act. The taxable value of the coal is as prepared for market. The coal is made subject to the tax not, as contended by the defendant, when the quantity and value are reported, nor when the settlement is made, but in the language of the act itself "when prepared for market." At that time its value is to be ascertained, but the report thereof is postponed until the end of the year. If this be not the true construction of the section, the phrase "when prepared for market" adds nothing to its meaning. What precedes sufficiently declares that the rate is to be based upon the value of each ton as prepared for market. The phrase "when prepared for market" manifestly relates to the words "shall be subject to," meaning the coal shall be subject to the tax when it is prepared for market. This being the proper construction, the defendant's coal became subject to the tax levied by the act when it was prepared for market. It was then the defendant's duty to ascertain the number of tons and fix the value at that time. The ascertainment of the value at that time amounted to an assessment. No other assessment was needed. Being made by the defendant, it has no room to complain, *Com. v. McKean County*, 200 Pa. 383. The coal was subject to the tax when it reached the stage of being prepared for market and its valuation was to be made at that time. The removal of it, therefore, from the State, or the sale of it to another, after that time, would not relieve the defendant, who was the owner at the time the tax was levied and assessed, from paying it; nor could it avoid liability by failing to assess and value the coal at the time the statute required it to be done.

We assume that the quantities and values reported by the defendant are such as the act required it to report and that they are correct. There is no suggestion to the contrary. A settlement, therefore, on the basis of its own report cannot be open to objection in respect to these particulars.

9. We are unable to see how the act conflicts with Article I,

Section 8, of the Federal Constitution, respecting the power of Congress to regulate commerce among the several states. In *Coe v. Errol*, 116 U. S. 515, it was said: "Goods, the products of a state intended for exportation to another state, are part of the general mass of property of the state of their origin until actually started in course of transportation to the state of their destination, or delivered to a common carrier for that purpose." See also *St. Louis S. W. Ry. Co. v. Arkansas*, decided December 7, 1914, and not yet reported. If we be right in our construction of the act, the coal here sought to be taxed became subject to the tax at the time when it was prepared for market, and, so far as it appears, that was before it was actually started in the course of transportation from the State. This objection must therefore fail.

10. Nor does the act violate Clause 5, Section 9 of Article I of the Federal Constitution, which provides that "No tax or duty shall be laid on articles exported from any state." This provision is limited to articles exported to a foreign country. *Woodruff v. Parham*, 8 Wall. 123; *Brown v. Houston*, 114 U. S. 622; *Dooley v. U. S.*, 183 U. S. 151.

11. The objection to the sufficiency of Section 5 as an appropriation becomes immaterial in the view we have taken of this case. The only concern which the defendant has with the section in this proceeding is confined to its effect on the rest of the act; to that extent we have considered it. If the points made against it are well taken, its defects are open to remedy by the legislature. Without it the rest of the act can stand. However, under *Com. v. Powell, et al.*, *supra*, its sufficiency may hardly be questioned.

#### CONCLUSIONS.

For the considerations thus stated we conclude:

1. That the title of the Act of June 27, 1913, P. L. 639, is not defective.
2. That the act does not contain more than one subject within the meaning of the constitutional mandate of Section 3, Article III.
3. That the act is not invalid because it may impose double taxation.



4. That the act manifestly shows that the tax therein levied is to be paid by the operator.

5. That the act does not violate Section 7, Article III of the Constitution.

6. That the act is not a local or special law so as to require notice of the intention to apply therefor to be published. Section 8, Article III, of the Constitution.

7. That the act is not violative of Sections 1 and 2 of Article IX of the Constitution.

8. That the act does not violate the Fourteenth Amendment of the Federal Constitution.

9. That the act does not conflict with Article I, Section 8, of the Federal Constitution.

10. That the act does not violate Clause 5 of Section 9 of Article I of the Federal Constitution.

11. That the coal is made subject to the tax when and at the time it is prepared for market.

12. That the value of the coal taxed is to be ascertained at the time when it is prepared for market.

13. That such valuation then made is equivalent to an assessment of the coal for the purpose of taxation.

14. That the removal by the defendant of its coal from the State, or the sale thereof to others, after it was prepared for market and assessed, does not relieve it from paying the tax thereon.

15. That the Commonwealth is entitled to recover as follows:

Amount of tax, .....	\$7,792.76
Interest from August 30, 1914, .....	311.70
Attorney general's commission, five per cent., .....	405.22

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Total, ..... \$8,509.68

for which sum judgment is directed to be entered against the defendant and in favor of the Commonwealth, unless exceptions be filed within the time limited by law.

**JOSEPH MILLEISEN'S SONS v. CUMBERLAND VALLEY R. R. Co.***Service of process on corporation—Jurisdiction.*

The sheriff's return on an alias writ of summons in an action for trespass against a railroad corporation showed that it had been served on the station master at one of the defendant's depots after it had been ascertained that none of the executive officers of the defendant resided within the county. The action was for damages for injury done to lumber in lumber yards in a county other than that in which suit was brought.

*Held:* 1. The service was proper.

2. The action being for injury done to personal property, the court has jurisdiction.

Rule to strike off service. C. P. Dauphin County. No. 472  
September Term, 1911.

*S. S. Rupp*, for plaintiff.

*Charles H. Bergner*, for defendant.

McCARRELL, J., Feb. 5, 1915.

An alias summons in trespass was issued in this case March 26, 1913, the original not having been served. The sheriff made return that he had served the alias "summons on the defendant company at its depot or station in the City of Harrisburg, Dauphin County, by handing a true and attested copy of the within writ to Clifford O. Kirecofe, its station master or agent, the person for the time being in charge thereof; and the said Clifford O. Kirecofe was informed of the contents of said writ, it being ascertained from him that none of the executive officers of said company was resident in the County of Dauphin." On April 21, 1913, an appearance was entered by counsel for defendant *de bene esse*. On February 24, 1914, plaintiff's statement was filed, claiming damages for the negligent operation by defendant of one of its engines along its tracks adjacent to plaintiff's lumber yards in Mechanicsburg, Pa., and thereby setting fire to and destroying much of the lumber in said yards. On March 18, 1914, an application of defendant's counsel, who had appeared, *d. b. e.*, a rule was granted to show cause why the service should not be set aside because of no service upon the proper officer of defendant company, and because the action was for injury of real property

not situated in Dauphin County. On March 26, 1914, plaintiffs filed their answer, under oath, to this rule to set aside the service of the summons, claiming that the rule was improperly granted, not being upon any petition or motion supported by affidavit; that the alias summons was properly served in accordance with the provisions of the Act of July 9, 1901, Section 1, a and e, P. L. 615; that the action is not for injury to real estate, and that the delay of nearly a year in applying for the rule until plaintiffs had filed their statement and entered a rule to plead made the special appearance general and that the same could not now be legally withdrawn. The Act of July 9, 1901, referred to by the plaintiffs, provides in Section 1, P. L. 615, as follows:

"The writ of summons, the writ of attachment in execution and the writ of scire facias in personal actions may be served by the sheriff upon a corporation, a partnership limited or a joint stock company where it is issued in any one of the following methods:

"(a) By handing a true and attested copy thereof to the president, secretary, treasurer, cashier, chief clerk or other executive officer personally, or

(Clauses b, c, and d, omitted as not revelant here).

(e) By handing a true and attested copy thereof at any of its offices, depots or places of business to its agent or person for the time being in charge thereof, if upon inquiry thereat the residence of one of said officers within the county is not ascertained or if from any cause attempt to serve at the residence given has failed."

The alias summons in this case appears by the sheriff's return to have been served in accordance with the provisions of this act of assembly. An examination of the statement of plaintiffs' cause of action shows that the plaintiffs are claiming damages for the destruction of a large quantity of lumber in their lumber yards, and are not claiming for any injury to real estate. We are therefore of opinion that the service of process has been duly made and that this court has jurisdiction of the cause of action as set forth in the plaintiffs' statement. The rule to set aside service of summons is therefore discharged and dismissed.

**PUBLIC SERVICE COMMISSION****AMERICAN REDUCTION CO. v. BALTIMORE & OHIO R. R. CO.***Refund of excess of class rate over commodity rate.***REFUND DOCKET No. 372.**

And now, to wit, May 12, 1915, after hearing in the above matter, it appearing that the rate for seventeen years upon the commodity transported was twenty-five cents per ton, that a commodity rate is now established at forty cents per ton, and that between the dates of November 2, 1914, and December 28, 1914, a class rate of one dollar sixty cents per ton was imposed but has not been collected, the opinion of the Commission is that the class rate of one dollar sixty cents a ton is unjust, unreasonable and illegal, and it is ordered: That the respondent, the Baltimore and Ohio Railroad Company, collect from the American Reduction Company no more than the commodity rate of forty cents per ton for the transportation during the said period from November 2, 1914, to December 28, 1914, inclusive.

By the Commission,

SAMUEL W. PENNYPACKER, *Chairman.*

## PUBLIC SERVICE COMMISSION.

STATE HOSPITAL OF COALDALE *v.* EASTERN PENNA. RWYS. CO.

### *Station Facilities.*

Complaint was made to the Commission that the station and waiting-room facilities of the Eastern Pennsylvania Railways Company in the Borough of Coaldale, were inadequate and insufficient.

At a hearing, the company was ordered to afford additional facilities by the erection of a shelter station.

*R. J. Graeff*, for complainant.

*C. F. Crane*, for respondent.

### ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had;

*Now, to-wit, April 20, 1915, it is ordered:* That the Eastern Pennsylvania Railways Company shall erect on or before May 30, 1915, a shelter station of suitable size to accommodate the traveling public, on the site specified in the complaint, near the property line of the State Hospital, in the Borough of Coaldale.

By the Commission,

SAMUEL W. PENNYPACKER, *Chairman.*

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WEST VA. PULP & PAPER CO., ET AL., *v.* PENNA. R. R. CO., ET AL.

*Rates—Increase of—Reasonableness—Burden of proof—Evidence required to meet the burden—Act of July 26, 1913, P. L. 1374, Art. V, Sec. 4.*

The West Virginia Pulp and Paper Company and other companies engaged in the manufacture of paper complained that the respondent railroad companies had recently published and filed local and joint tariffs on pulp wood which increased the car-load rate to the extent of ten cents per net ton, and that the increased rates were excessive, discriminatory, unjust and unreasonable.

The evidence disclosed that prior to the year 1903, pulp wood was included in Class D in the tariffs of the respondent companies, and that in

that year the rate upon pulp wood was fixed at ten cents a ton below the rate of Class D; that in accordance with a suggestion of the Inter-State Commerce Commission, the respondent companies have recently advanced the rate on pulp wood by restoring it to the class from which it had been removed in 1903; that the recently established rates on pulp wood are less than those upon match-wood and other commodities of lumber somewhat similar in character, and that the net revenues of the respondent had largely decreased within the last three years.

*Held:* That the burden of proving the reasonableness of an increase of rates rests upon the carrier, and that the question of whether or not, in any particular case, such proof has been adduced, is left in large measure to the judgment of the Commission; also that, under the testimony produced in this case, the Commission is of the opinion that the advance of rates upon pulp wood is just and reasonable.

#### COMPLAINT DOCKET No. 300.

#### Report and Order of the Commission.

*O. H. Hewitt and Robert D. Jenks*, for complainants.

*Wm. I. Shaffer and F. L. Ballard*, for respondents.

#### COMMISSIONER PENNYPACKER, *Chairman:*

The complaint sets forth that the complainants are corporations engaged in the manufacture of book and other commercial paper, having mills at Tyrone, Williamsburg, Lock Haven, Roaring Springs, York Haven and Johnsonburg, in Pennsylvania; that they use a large amount of pulp wood, of which approximately one hundred and fifty thousand tons per annum are shipped to these mills from various places within the State of Pennsylvania; that the transportation of pulp wood is a desirable business for the railroads, since it can be handled at a low cost, does not require an expedited movement, and can be handled in many different types of cars; that the rates charged for the transportation of pulp wood heretofore were "unjust and unreasonable; that the railroads, respondents have recently published and filed local and joint freight tariffs on pulp wood in carloads, which increase the carload rate to the extent of ten cents per net ton;" that the effect will be to increase the rate which they pay on shipments of pulp wood from points in Pennsylvania to their mills

"from ten to eighteen per cent."; and that these increased rates are "excessive, discriminatory, unreasonable and unjust."

The petition then asks that the respondents be commanded to "cease and desist from charging such unjust, unreasonable and discriminatory rates" and for reparation.

The answer of the respondents admits that the transportation of pulp wood does not require an expedited movement, that it can be handled in different types of cars, and that it is a desirable traffic, but denies that it yields a large revenue or can be handled at a low cost, and denies that the rates "are excessive, discriminatory, unreasonable, unjust or otherwise in violation of law."

From the testimony taken at the hearings, the following facts are found:—

Pulp wood is a low grade commodity procured from lumber operations. After the lumbermen have removed the saw logs, veneer logs and prop timber, the residuum is sawed into sticks from four to five feet in length for pulp wood. If not so used, it would probably be left to rot in the woods. It includes all kinds of timber except oak, ash, hickory and chestnut. The sticks are two inches in diameter and as much larger as they can be secured. It may be described as the refuse of the timber. Box, stock, regular and gondola cars are used in its transportation. It does not have to be protected from the weather. During the year ending Sept. 30, 1913, the complainants received fifty-nine hundred and sixty-six cars, containing one hundred and forty-one thousand and sixty-one tons of pulp wood, upon which they paid freight amounting to \$111, 836.00. About two-thirds of this amount was intrastate traffic. The freight charges represent 41.5 per cent. of the cost of pulp wood at the shipping point.

The rates against which the complaint is made increase the percentage at Tyrone, 13; Williamsburg, 13; Roaring Springs, 13.5; York Haven, 7.4; Lock Haven, 3.5 and Johnsonburg, 11.7 per cent.

Upon the real question which is raised between the parties upon this complaint and answer, that is, as to whether or not the increase of ten cents a ton upon the transportation of pulp wood by the respondents to the plants of the complainants is excessive, unreasonable, discriminatory or unjust, the evidence is rather mea-

gre. It appears that the rates charged by the Pennsylvania Railroad for the transportation of pulp wood are nowhere in the State less than the charges to the complainants.

Under Section 4 of Article V of the Act of July 26, 1913, it is provided that "at any such hearing involving any proposed increase in any rate, the burden of proof to show that such increased rate is just and reasonable shall be upon the Public Service Company."

The respondents made no attempt to prove what was the cost of the transportation of pulp wood, or what was the resulting compensation to them for such transportation. In a general way the General Freight Agent of the Pennsylvania Railroad Company testified that the rates upon pulp wood were inherently low, and in comparison with other rates had not been remunerative. It is manifest that to ascertain the cost of the transportation of any special commodity with exactness would require an investigation of what would be a reasonable return upon the entire capitalization of the corporation and a valuation of its entire property. Such a process, the witness testified, would be neither feasible nor desirable. It must be conceded that such an ascertainment would be attended with extreme difficulty and great expense. The evidence disclosed that prior to the year 1903, commodities were divided into four lettered classes, A, B, C, and D. The lowest class was D, which included in it, pulp wood, shavings, shingles, rough stone, timber, granite and certain other commodities. Pulp wood had been in this class for fifteen or twenty years. For some reason which does not clearly appear, in that year the rates upon pulp wood were fixed at ten cents a ton below those of Class D, and it thereafter, until the recent changes, stood as a commodity in a class by itself.

Prior to the increase of rates upon pulp wood of which complaint is made, the Interstate Commerce Commission made this suggestion :

"We suggest that all the railroads in official classification territory examine carefully their freight rates, rules and regulations with a view to increasing rates that are found to be clearly unremunerative, and modifying burdensome rules and regulations, relating to minimum weights and similar matters where this may be justly done."



Following this suggestion the respondent advanced a number of rates including those upon pulp wood, the substantial effect of which was to restore pulp wood to the class from which it had been removed in 1903.

A comparison of rates shows that the rates so established upon pulp wood are less than those upon match wood, pin wood and handle wood, commodities of lumber somewhat similar in character. Only one similar commodity, extract wood, has lower rates than pulp wood. This is a wood used for making wood extracts and has slightly lower rates, but there is only one plant so engaged on the lines of the respondents.

A table filed by the Pennsylvania Railroad Company shows that the net corporate income of that corporation had fallen from \$40,481,748.00 in 1912 and \$42,042,736.00 in 1913 to \$37,796,199.00 in 1914. These constitute the main facts upon which the respondents relied to justify the increase of rates.

The manager of the wood and traffic department of one of the complainants, when asked why he thought the increased rates too high, replied:

"On account of the class of equipment, the nature of the commodity and the desirability to haul it, handle it by the carriers; and furthermore on account of our business more than anything else."

Q. "It would cut down your profits, would it?" \*

A. "It would cut down our profits; yes sir."

There was evidence that the rates on pulp wood imposed by the Pennsylvania Railroad Company in this State were higher than those of any other railroad or of any Commission without the State, and that one dollar will in Wisconsin, carry a ton of pulp wood two hundred and fifty-nine miles, on the Baltimore and Ohio Railroad two hundred miles, on the Delaware and Hudson Railroad two hundred miles, on the Chesapeake and Ohio and Norfolk and Western Railroads one hundred and fifty-five miles, on the Boston and Maine Railroad one hundred and thirty miles, on the Buffalo, Rochester and Pittsburgh Railroad ninety miles, while on the Pennsylvania Railroad, in this State, the same sum will only carry a ton of pulp wood from sixty-five to seventy-five miles.

These constitute practically all of the relevant facts to be elicited from the evidence presented in the case, and upon the consideration of them a determination of the question submitted to the Commission will have to be reached.

While under the statute the burden of proving the reasonableness of the increase of rates rests upon the carrier, there is no statutory determination of what shall be the character of such proof.

As to whether or not in any particular case such proof has been adduced, has been left in large measure to the judgment of the Commission. It is sufficient if the evidence produced satisfies the minds of the Commission, acting fairly and endeavoring to reach a correct conclusion, that the rates as they are increased are reasonable and just.

It is not the purpose of the Commission to attempt to designate specifically by any defined lines what is the kind of proof required by the language of the statute, and perhaps it would be impossible to give any accurate and exact definition. For the present it is enough to say that it must be such proof as will convince the judgment of reasonable and sensible men, that the rates should be increased to the extent set forth in the proposed tariff.

One of the evils which the Act of July 26, 1913, and the legislation of other states and the United States upon the same subject was intended to correct, is that of discrimination in rates. It had grown to be a custom of carriers to give in various ways special advantages to favored individuals and industries, which enabled them to succeed, while other struggled and failed.

It is one of the purposes of the act that this condition shall no longer exist. Under the present system of regulation, the effort is being made to overcome the irregularities which have arisen and in some instances, have long continued. This was no doubt the purpose of the suggestion made by the Interstate Commerce Commission which has been heretofore herein cited.

It is plain that if such equalization of rates is to be accomplished, those industries which have been heretofore favored must surrender the advantages over other industries which have been accorded to them by the carriers. In the present case down to the year 1903, pulp wood was placed in the lowest class in the

classification of rates. In that year, for some reason which may have been no more than the desire of the carriers to encourage a struggling industry, with the hope that in the future it might become a profitable feeder to the lines of railroad, pulp wood was given an advantage of ten cents a ton over other commodities of the same class.

Under the present different system and in an effort to meet the suggestion of the Interstate Commerce Commission, it has now been returned to the former classification. It appears from the testimony that the rates upon pulp wood as they have been increased are not greater than those upon similar commodities, with the exception of one commodity of minor importance.

It further appears from an examination of the general financial conditions of the respondents that they are passing through a period of decreased net revenue. The complainants do not contend that their business will be vitally or even seriously affected by the increase, but they rest mainly upon the comparison of the rates with those upon pulp wood in other jurisdictions.

The fact that lesser rates exist elsewhere throws some light upon the problem, but a determination based upon this fact ought to be given with great caution.

In the absence of testimony showing a similarity of conditions, a length of time sufficient to test the effect of such rates, the compensation produced by them as compared with the outlay, and other important facts, it would be unsafe to rest a decision upon such comparison.

In the case of *Montana v. Denver and Rio Grande Railroad Company*, 27 I. C. C. 522, the Interstate Commerce Commission said:

"But these comparisons are not accompanied by evidence as to whether transportation conditions are similar or otherwise. In the absence of such evidence they furnish little or no aid in the solution of the question before us."

It is the opinion of this Commission after a careful consideration of all the facts, that the respondents have given such evidence as satisfies the Commission that the advance of the rates upon pulp wood is just and reasonable. The complaint will therefore, be dismissed.

**ORDER.**

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

*Now, to-wit, May 20, 1915, It is ordered:* That the prayer of the complainant be, and the same hereby is refused, and the complaint dismissed.

By the Commission,  
SAMUEL W. PENNYPACKER, *Chairman.*

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**PETITION OF THE TOWNSHIP OF JENKINS.*****Approval of contracts—Competition in small community—Public convenience***

The petitioner, the Township of Jenkins, asks the approval of the Commission for a street lighting contract with the Jenkins Township Electric Light, Heat & Power Co. This company has, at present, no facilities for furnishing light and proposes to purchase its current from a local railroad company. The Citizens' Electric Illuminating Co., which has an efficient plant and has been providing adequate service to the township and to its citizens for ten years, protests. The bid made by the protestant would, if accepted, have given the township the desired service at reasonable rates. The community to be served is too small to support two competing companies in this field of service.

*Held:* The contract should not be approved. The ultimate effect of unprofitable competition is a relatively high charge for poor service.

Schuylkill Light, Heat & Power Co.'s Petition, 1 P. C. R. 122, followed. See also ante pp. 42, 52 and 372.

**MUNICIPAL CONTRACT DOCKET No. 5, 1915.****Report and Order of the Commission.**

*E. E. Beidleman and J. J. McDonnell*, for Jenkins Twp. Elec. Light, Heat and Power Co.

*W. L. Pace*, for Township of Jenkins.

*F. W. Fleitz and R. J. Baker*, for Citizens' Electric Co., protestant.

COMMISSIONER JOHNSON :

The Township of Jenkins, Luzerne County, Pa., through its solicitor, W. L. Pace, Esq., makes application to the Public Service Commission for the approval of a contract executed on the 21st of December, 1914, by the Township of Jenkins and the Jenkins Township Electric Light, Heat and Power Company. The Board of Supervisors of Jenkins Township at a meeting held December 4, 1914, directed the secretary of the board to advertise for bids for lighting the streets and alleys of the township for a period of two, three or five years from May 1, 1915, the date of the expiration of the then existing contract for street lighting. In pursuance of this resolution, the secretary advertised "for sealed proposals for lighting with electric light, or other illuminating medium, the streets, highways, lanes, alleys and other public places of and in said township for a period of two, three or five years, from the expiration of the present lighting contract, with 72, or more, Westinghouse metallic flame arc lamps, or any other modern lighting system equally as good."

Bids submitted were to be presented to the Board of Supervisors at a meeting to be held December 21, 1914, and at the meeting held upon that date the Board of Supervisors received two bids. One bid was from the Jenkins Township Electric Light, Heat and Power Company,—a company that was incorporated in 1909, but which has not yet equipped itself with facilities for rendering service. The company has no generating station, but has erected some poles and wires in the township with a view to doing domestic lighting with current which it expects to obtain from the Lackawanna and Wyoming Valley Railroad Company, operating the railway popularly known as the Laurel Line. The offer of the Jenkins Township Electric Light, Heat and Power Company was to furnish and maintain the desired number of general electric arc lamps at the following rates per lamp per annum: For a period of two years, \$51; for a period of three years, \$50; for a period of five years, \$48. This company also made four other proposals: One for furnishing and maintaining Westing-

house metallic flame arc lamps at a rate per lamp per year of \$49, \$48 and \$47.50, for periods of two, three and five years, respectively. The other three proposals made by this company were to provide Mazda lamps of different candle-power and different fixtures. One of these proposals was to furnish and maintain 250 candle power, type C Mazda lamps, with street hoods, at rates per lamp, per year, of \$40, \$39 and \$37, for periods of two, three and five years, respectively.

The other bid received by the Board of Supervisors for lighting the streets of Jenkins Township was submitted by the Citizens' Electric Illuminating Company,—the company that was then furnishing the light under an existing contract. The offer of the Citizens' Electric Illuminating Company was to provide and operate 72, or more, arc lights at a rate of \$45 each per annum, for a term of two, three or five years, "in accordance with the specifications" in the advertisement, "and the contract conditions herewith." The phrase "contract conditions herewith" contained in the bid submitted referred to a draft of a contract which accompanied the bid, and which specified that the lamps proposed to be furnished were "arc lights known as series luminous, or magnetite, the same as now being furnished and operated in the township by the company." The bid of the Citizens' Electric Illuminating Company upon general electric luminous arc lamps was three dollars per lamp per annum lower than the bid of the Jenkins Township Electric Light, Heat, and Power Company upon that type of lamp.

At the meeting held upon the 21st of December, 1914, at which the two bids were opened, the Board of Supervisors by a divided vote decided to accept the offer of the Jenkins Township Electric Light, Heat and Power Company to supply 72, or more, 250 candle power, Type C, Mazda lamps with street hoods, for a period of five years, at the rate of \$37 per lamp per annum; and the same evening a contract was executed by the township supervisors and by the officials of the Jenkins Township Electric Light, Heat and Power Company. The supervisors of Jenkins Township have applied to this Commission for its approval of this contract. The Citizens' Electric Illuminating Company has petitioned the

Commission to withhold its approval of the contract, and both sides have presented testimony in support of their petitions.

In petitioning the Commission to withhold its approval of the contract in question, the protestant alleges, among other things, that the petitioner has, since August, 1904, provided a reasonable, adequate, sufficient, and satisfactory service to the public in Jenkins Township at just, reasonable, and fair rates, and in the complete discharge of its duty as an electric company; that the company has an efficient and modern plant with all modern facilities for serving the public; that the "illuminating unit, namely two hundred and fifty candle power, type C, Mazda lamps, for which bids were submitted and received by the Board of Supervisors and upon the basis of which the contract was awarded and entered into, is not of an illuminating power equal to Westinghouse metallic flame arc lamp, or to general electric arc lamps, but is of much less and inferior illuminating power, and is an entirely different form of illuminant;" that the Township of Jenkins, which is approximately two miles by seven miles in area, and which had a population of 4,196, according to the census of 1910, does not present a commercially attractive field for one company, much less for two, and to permit another electric light company to enter and operate in this township would "work irreparable injury to your petitioner and its investment."

The following issues are raised by the petitions for and against the approval of this contract: (1) Were the bids in accordance with the specifications; (2) which of the two proposed lighting systems submitted would give the township a more effective lighting service for the same expenditure; and (3) is the approval by this Commission, of the proposed contract, "necessary or proper for the service, accommodation, convenience or safety of the public?"

The Board of Supervisors in advertising for proposals for lighting the streets of the township specified that the lighting should be by "Westinghouse metallic flame arc lamps, or any other modern lighting system equally as good." The Citizens' Electric Illuminating Company offered to light the streets with series luminous or magnetite arc lamps, such as the company was then using in lighting the streets of the township. The testimony

shows that the lamps in use were the four-ampere magnetite lamp made by the General Electric Company. The bid accepted by the Board of Supervisors, and the contract submitted to this Commission for approval provides that the Jenkins Township Electric Light, Heat and Power Company, shall "install and furnish in and for said township 72, or more, 250 candle power, type C, Mazda lamps with street hoods." Thus neither the bid accepted by the township Board of Supervisors nor the bid submitted by the Citizens' Electric Illuminating Company contemplated the use of Westinghouse flame arc lamps. Both the bid accepted and the one rejected were covered by the clause, "or any other modern lighting system equally as good," contained in the specifications adopted by the Board of Supervisors in calling for proposals for lighting. The bids of both companies were in accordance with these specifications.

As to the relative illuminating power of the four-ampere luminous arc lamps and the 250 candle power type C, Mazda lamps, each being equipped with hood, it was testified by Mr. E. L. Nash, an electric lighting expert called as a witness by the protestant, that "the four-ampere luminous lamps (at) an angle of 70 degrees, yield seven hundred candles; the two hundred and fifty candle mazda with street hood yields two hundred and fifty." (Record, p. 234.) Mr. Nash also stated that by the use of refractors "your two hundred and fifty candle Mazda lamp then yields four hundred and fifty candles at 10 degrees (below horizontal), and your arc lamp yields practically one thousand." (Record, pp. 240-41.) The installation of refractors however, was required neither by the bid accepted by the Board of Supervisors nor by the bid submitted by the protestant company. The bid that was accepted designated a lamp of 250 candle power, and the one that was rejected referred to a lamp of 700 candle power, this intensity of illumination being at an angle of 10 or 15 degrees below horizontal in the case of each lamp.

The four-ampere luminous arc lamp has been on the market for several years; it is an efficient and satisfactory type of street lamp. This Commission In Re Petition of the City of Pittston for the Approval of Street Lighting Contract with the Citizens' Electric Illuminating Company (decided July 21, 1914) [ante p.



105], refers to this lamp as "one of several types of modern lamps that are in general use and giving satisfactory service in many cities." The testimony shows that, while the 250 candle power type C Mazda lamp is one of the latest types of lamps, it would require to provide a given amount of illumination an appreciably larger number of such lamps than would be required if four-ampere luminous arc lamps were used. For an equal expenditure of money, the township of Jenkins can secure more illumination from the four-ampere luminous arc lamps at \$45 per lamp per year than from type C, Mazda lamps of 250 candle power at \$37 per lamp per year.

The petition in this case raises a question of public policy that has been considered in passing upon several similar prior petitions. The Public Service Company Law of July 26, 1913, provides that the Commission's approval of applications such as this "shall be given only if and when the said Commission shall find or determine that the granting or approval of such application is necessary or proper for the service, accommodation, convenience or safety of the public." Does the evidence show that the approval of the contract now before the Commission is necessary or proper for the service of the public?

The public *necessity* for the approval of the pending contract is not apparent from the evidence. For more than ten years, the commercial and street lighting in the Township of Jenkins has been done by a company fully equipped for the performance of the service required and amply able to make such extensions as may be needed. The complaints as to the services rendered by the company are of minor importance; and it may well be doubted whether a new company with more limited financial resources, and with no experience in furnishing light, would be able to serve the public as efficiently as it is now being served. The rates at which the company now in the field offers to continue the service of street lighting are not high in comparison with the rates paid elsewhere for similar service, and are fully as reasonable as are the rates offered by the company desiring to enter the field.

Do the facts in this case warrant the Commission in finding that the approval of the contract under consideration is *proper* for the service, accommodation and convenience of the public? Is it

proper that the street lighting which the public in Jenkins Township needs and desires to obtain, shall be secured by the introduction of a new company into the service? Would this be for the best interests of the public?

Jenkins Township is about fourteen square miles in area, and has a scattered population which numbered only 4,196 when the census of 1910 was taken. The population is divided among five villages, one of which being several miles distant from the others, is not included in the territory covered by the present or proposed street lighting service. The Citizens' Electric Illuminating Company which now provides both the street lighting and commercial lighting has been receiving about \$4,600 a year for street lighting, and in 1914 obtained about \$3,400 from 141 individual consumers of current. The gross revenues of the company in the township in 1914 were thus about \$8,000. The company's offer to furnish street lighting in the future at \$45 per lamp, per annum would if accepted, reduce the company's revenue \$20 per lamp, or \$1,440 per year. Based upon the business of 1914, the company's prospective gross revenue would be between \$5,600 and \$5,700. There is much force in the contention of the protesting company that there is not enough business in Jenkins Township to enable two companies permanently to operate successfully, and provide good service at reasonable rates.

When services that may be rendered with profit only by one company are divided among two companies, neither one of which can conduct its business at a profit, the services are quite certain to deteriorate. However, the ultimate effect of unprofitable competition is a relatively high charge for a poor service.

In its decision *In Re Petition of Schuylkill Light, Heat and Power Company for Approval of an Ordinance of the Borough of Ashland*, (Municipal Contract Docket No. 1) [1 P. C. R. 122], this Commission took the position that—

"The passage of the Act of July 26, 1913, and of similar acts in nearly all of the other states indicates a general judgment that a reliance upon competition between public service companies for securing adequate service and proper rates has not been successful, and that hereafter supervision by properly constituted authorities is to be substituted. Long experience has shown that while the temporary effect of

competition between public utilities occupying the same territory is to secure lower rates, the final result is likely to be the absorption of one by the other, and then, an increase of rates to pay the expense of the warfare."

A similar view was expressed by the Commission In Re Petition of the Borough of Exeter for the Approval of a Franchise-Contract Granted to the Consumers' Electric Company of the Borough of Exeter, (Municipal Contract Docket, No. 34) [ante p. 52], and it was held In Re Petitions of the Borough of Avoca, (Municipal Contract Dockets Nos. 257 and 258) [ante p. 372], that the borough, which had a population of 4,600 was "not of sufficient size to sustain two systems of supply (for electric lighting), profitably," and the Commission was "unable to find that the approval of the proposed contract is 'necessary or proper for the service' of the public or likely to be of permanent benefit to the people of Avoca."

It is our opinion that the facts do not warrant the Commission in finding the approval of the contract for street lighting entered into, on the 21st of December, 1914, by the Township of Jenkins, Luzerne County, and the Jenkins Township Electric Light, Heat and Power Company to be necessary or proper for the service, accommodation or convenience of the public. The approval is therefore withheld and the application dismissed.

#### ORDER.

This case being at issue upon petition and protest on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

*Now, to-wit, May 18, 1915, It is ordered:* That the approval prayed for be, and the same is hereby refused and the petition dismissed.

By the Commission,  
SAMUEL W. PENNYPACKER, *Chairman.*

## APPLICATION OF EAST PENN GAS LIGHT CO., ET AL.

*Approval of merger—Protest—Effect of on business of protestant.*

Five gas companies asked the approval of the Commission for their merger. One of them holds the right to supply gas for light, heat and fuel in all of the territory served by the protesting company except a small borough. The evidence showed that the approval of the merger would not seriously interfere with the business of the protestant, if at all, and that the merger will result in more economical and efficient operation by the petitioners.

*Held:* The merger should be approved.

APPLICATION DOCKET No. 189, 1915.

Report and Order of the Commission.

*C. B. Miller*, for petitioner.

*Dallas Gillingner* and *Clarence H. Stead*, for protestant.

BY THE COMMISSION :

The East Penn Gas Light Company, Macungie Gas Company, Macungie Gas and Fuel Company, Perkiomen Gas and Fuel Company, and Fleetwood Gas and Fuel Company, applied to The Public Service Commission for a Certificate of Public Convenience evidencing the approval by the Commission of the consolidation and merger of the property, powers, franchises and privileges of the Macungie Gas Company, Macungie Gas and Fuel Company, Perkiomen Gas and Fuel Company and Fleetwood Gas and Fuel Company into and with the property, powers, franchises and privileges of the East Penn Gas Light Company, and the Penn-Green Gas Company filed objections to the issuing of the certificate and approval of the merger.

From the testimony produced at the hearings held on this application, it appears that the East Penn Gas Light Company is a corporation organized by the consolidation and merger of a number of companies incorporated under the laws of this State for the purpose of furnishing gas for heat, light or fuel in various districts in Lehigh, Montgomery and Berks Counties; that it has erected at Emaus, in Lehigh County, a plant for the manufacture

of gas, from which it has been supplying a portion of the territory in which it is authorized to conduct its operations, and from this plant it is proposed to distribute gas to the territories covered by the charters of the other applicant companies. If the proposed consolidation and merger of the corporations is approved by this Commission, the consolidated company will be authorized to supply gas for light, heat and fuel in various communities in the neighborhood of Emaus which are contiguous to each other, and which can be supplied economically and satisfactorily from one central distributing point.

The protestant company is at the present time furnishing service to about sixty consumers in a small portion of the territory that would be covered by the proposed merged company, and one of the merging companies claims the right to furnish gas for light, heat and fuel in all of the territory of the protestant company, with the exception of the Borough of Green Lane. From the testimony it appears that the approval of the proposed merger would not interfere with the business and service of the protestant company to any great extent, if at all, and inasmuch as it is very clear that the entire district can best be served by one central plant, it is the opinion of the Commission that the application should be approved, and,

*Now, to-wit, May 20, 1915, It is ordered:* That the Certificate of Public Convenience approving the proposed merger and consolidation be issued.

By the Commission,  
SAMUEL W. PENNYPACKER, *Chairman.*

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CITY OF SCRANTON *v.* SCRANTON RAILWAYS COMPANY.

*Street railway companies—Extension of lines beyond termini named in charter—Power of Commission to compel—Act of July 26, 1913, P. L. 1374, Art. V, Sec. 13.*

The councils of the City of Scranton passed an ordinance authorizing the Scranton Railways Company to extend the lines of its street railway system over certain streets in said city. The proposed extension lies beyond the termini named in the charter of the company, and the franchise granted therein is limited to fifty years. Upon refusal of the company to accept the ordinance and make the proposed extension, the City of Scranton

ton complained to the Commission and requested that the Commission make an order compelling the company to accept the ordinance and make the extension.

*Held:* Article V, Section 13, of the Public Service Company Law gives the Commission the power to compel a public service company to extend its facilities and service, if for the service, accommodation, and convenience of the public, into every portion of the municipality in which it is authorized by its charter to do business; but the Commission has no power to compel the making of an extension beyond the points covered by the charter of the company.

#### COMPLAINT DOCKET NO. 274.

##### Report and Order of the Commission.

*D. J. Davis*, for complainant.

*H. B. Gill*, for respondent.

##### COMMISSIONER WALLACE:

The City of Scranton, by its councils passed an ordinance approved by the mayor on May 16, 1914, "authorizing the extension and operation of the lines of the Scranton Railways Company on Luzerne street, from the present end of the track to Twenty-fourth street; thence on Twenty-fourth street to Continental street; thence west on Continental street, to Keyser avenue, and thence on Keyser Avenue to the dividing line between the City of Scranton and the Borough of Taylor."

On August 24, 1914, a complaint against the Scranton Railways Company was filed by the said city with this Commission, alleging that notwithstanding the enactment of the said ordinance, and the fact that the service of the said company in that portion of the city covered by the said ordinance is inadequate and insufficient for the accommodation and convenience of the public, the said railways company has refused to accept the ordinance or make the extension authorized therein, and praying that the respondent company be required to answer the charges, and that the Commission make such order as may seem meet.

Two questions are raised by the record in this case:

(1)—Does the evidence justify the Commission in issuing an order compelling the respondent railway company to extend its tracks?

(2)—Has the Commission jurisdiction, if the evidence so warrants, to order the respondent to extend its tracks under the terms of the ordinance, and compel it to make the contract embodied therein?

With respect to the first question, the evidence on the part of the complainant was that of the City Clerk of Scranton, who produced an ordinance presented to the city in 1912, a petition signed by about 200 persons requesting the passage of that ordinance, and a letter from the manager of the respondent company declining to accept the ordinance by reason of the limitation of time contained in it; and also a petition presented to councils just prior to the introduction of the ordinance of May 26, 1914. The ordinance presented in 1912 provided for a number of extensions in different parts of the city, (including the extension now provided for in the 1914 ordinance), and was amended so as to limit the franchise rights for the Luzerne street extension to fifty years, and the company declined to accept the ordinance for that reason. There is nothing in the testimony to show what effect the other extension provided for in the 1912 ordinance had upon the willingness of the company to make at that time the extension provided for by the 1914 ordinance.

On the part of the respondent, the testimony was to the effect that there was but one house on Luzerne street beyond the present terminus of the railways company, no houses on Twenty-fourth street, and only two houses on Continental avenue; that in the vicinity of Keyser avenue and Continental avenue there are about 27 houses, which it is claimed are located beyond the city line.

The length of the extension asked for is about 3,500 feet, and the cost of the construction, including the paving necessary under the ordinance, about \$18,000. The evidence shows that persons residing at "Continental, Archibald and Payne," being the names of collieries and breaker settlements outside the city limits, would be accommodated by the proposed extension, but it does not appear how many persons from these settlements used the line of the railway as present located, or would use it if extended.

The Commission is of the opinion that the evidence does not establish such necessity for the accommodation of the public re-

siding in that portion of the city covered by the proposed extension as would justify it in compelling the respondent railway company to make the proposed extension, which would require a daily increase in mere operating expenses of \$17.00.

With regard to the second question, the power of the Commission to compel by its order the respondent company to extend its tracks depends upon the interpretation given to the following provisions of the Public Service Company law.

Section 1, Article I, which is, in part, as follows:

"The term 'Facilities,' as used in this act, includes all plant and equipment of a public service company, which includes all tangible real and personal property, buildings, materials, easements, right of way, rights of trackage, subways, tunnels, railroads, street railways, tracks, \* \* \* \* \* and any and all other means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for by, or in connection with, the business of any public service company."

Section 13, Article V, which reads as follows:

"The Commission may, after hearing had upon its own motion or upon complaint, establish such standards of facilities and service of public service companies as shall be reasonably necessary for the safety, accommodation, or convenience of its patrons, employees, and the public; and require, by an order to be served in the manner hereinafter provided upon every public service company affected thereby, the facilities or service of such public service companies to conform to such standards. The Commission shall also have power, after hearing had upon its own motion or upon complaint to require public service companies to make all such repairs, changes, alterations, additions, extensions, and improvements, in and about their facilities, and service, as shall be reasonably necessary and proper for the safety, accommodation, convenience, and service of their patrons, employees, and the public."

Does the provision that "the Commission shall have power to require extensions in and about facilities (including tracks), and service," mean to confer power upon the Commission to order an extension of tracks beyond the termini named in the charter of the company; or, should it be construed to mean an extension of



the facilities in the territory covered by and embraced in the charter, and in which the company is bound by the charter to supply service? There can be no doubt that the Commission has the power to compel a public service company to extend its facilities and service, if for the service, accommodation and convenience of the public, into every portion of a municipality in which it is authorized by its charter to do business; but to order an extension beyond the points covered by its charter would be to assume power in the Commission which cannot be fairly interpreted from any of the provisions of the Act of July 26, 1913.

The charter of a street railway company specifies its route and designates the streets upon which it shall be constructed, and also the termini. Before it can construct its route, consent must be obtained from the municipality, which can prescribe conditions under which the franchise is granted. After construction, extensions can only be made by a vote of its stockholders authorizing said extension, and consent of the municipality is again necessary, if permission to make said extension was not granted in the original franchise. To hold, therefore, that the Commission had power to order a street railway company to make an extension beyond points named in its charter would be in effect to compel the stockholders to authorize the extension, and to require the company to enter into a contract with the municipality upon any terms which it might impose. In this case, Section 7 of the ordinance of 1914 provides:

"That the franchise hereby granted to the Scranton Railway Company shall be limited to a period of fifty (50) years from the approval of this ordinance, and at the expiration of said term of fifty (50) years, this franchise, and everything operating under the same and all rights thereunder shall be, upon demand from the City of Scranton, surrendered by said company and turned over to the City of Scranton, at its actual value at that time; said value to be determined, ascertained and established by three (3) disinterested persons, who shall be appointed by the Court of Common Pleas of Lackawanna County, upon request of the Mayor of the City of Scranton, and from whose decision either party hereto may appeal to the Court of Common Pleas of Lackawanna County, in the same manner and with like effect as if the appeal were taken from an award of viewers."

The provision of this section of the ordinance, "everything operating under the same and all rights thereunder shall be, upon demand from the City of Scranton, surrendered by said company and turned over to the City of Scranton at its actual value at that time," is very indefinite and ambiguous. This might be held to mean all its cars, power house, in fact, practically its whole system; even if it should be limited to the tracks, wires, overhead construction and cars used only upon the extension, the result would work a great injustice upon the stockholders of the Scranton Railways Company, as the cost of the original grading and paving required by the ordinance should be considered, as well as any loss which may have occurred in operation during the life of the franchise. The provision of this Section 7 which terminates the franchise at the end of fifty years, while the charter of the company grants it perpetual existence, we do not think it necessary to consider, as the Commission is further of the opinion that it has not the power, under the act creating it, to compel a public service company to extend its facilities beyond the territory covered by its charter or amendments thereto.

Therefore, an order will be issued dismissing the complaint in this case.

#### ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

*Now, to-wit, May 20, 1915, It is ordered:* That the complaint in this case be, and the same is hereby dismissed.

By the Commission,

SAMUEL W. PENNYPACKER, *Chairman.*

**PITTSBURGH PLATE GLASS CO. v. PENNA. RAILROAD CO.*****Demurrage—Private cars on private sidings—Scope of general demurrage rules.***

In the case of the Pittsburgh Plate Glass Co. v. P. R. R. Co., ante p. 530, Commissioner Johnson filed the following opinion concurring in the conclusions reached by the majority but basing his concurrence upon different grounds.

*Held:* 1. The uniform demurrage rules do apply to private cars delivered by the railroad upon a siding belonging to the owner of the car.

2. The enforcement of the said rules in this case creates a discrimination against complainant, and for this reason the respondent's tariffs should be so modified as to exempt the complainant's cars from payment of demurrage.

3. The case of Proctor & Gamble Co. v. Cin. H. & D. R. R. Co., 19 I. C. C. 556, differs from this case. There the carrier was not bound to carry the private cars of the complainant, and did so only under an agreement of which the demurrage rules formed a part. Here the carrier is bound under its charter to carry the private cars of the complainant, and complainant has made no agreement submitting to the terms of the said demurrage rules.

For majority opinion see ante p. 530.

**COMPLAINT DOCKET NO. 227.****COMMISSIONER JOHNSON: (Concurring)**

I concur in the finding of the Commission that the petition of the complainant in this case should be granted and his application sustained; but I am unable to accept the view that the demurrage rules do not "cover the case of delivery to the owner upon his own tracks in the absence of any agreement which expressly or impliedly puts the cars in the service of the carrier." The view expressed in the majority opinion is that "If these rules had provided that private cars not only when on private tracks, but on private tracks belonging to the owner, should be subject to demurrage, the question of the reasonableness of the rules would have arisen." It is my opinion that the demurrage rule in question is so worded that it does apply to private cars delivered by the railroad upon a siding or track belonging to the owner of the car, and that the question of the reasonableness of enforcing the rule under the circumstances obtaining in the case at issue must be determined.

The committee of the National Association of Railway Commissioners which drafted the demurrage rule in question called attention in the report which the committee drafted in support of the rules to the fact that carriers generally, and some private car lines, favored a rule that "exempts private cars from demurrage when standing upon the private sidings of their owners." The report sets forth in detail the reasons why the committee did not favor such a rule, the objection of the committee being based upon the thought that "the car owner can claim no advantage as a shipper that would not accrue to him if the car were owned by a different person having no interest in the freight." It was also the view of the committee that "every car in railroad service is a railroad car," and "that cars under lading are in railroad service until unloaded and regularly released."

The Interstate Commerce Commission in *Proctor & Gamble Co. v. Cincinnati, Hamilton & Dayton R. R. Co., et al.* (19 I. C. C. Reps. 556), after quoting the demurrage rule in question, stated "complainant objects to the rule, in so far as it provides for demurrage upon private cars while standing upon private tracks, and particularly to the provision that if private cars are returned under load, railroad service is not at an end until the lading is removed." The complainant in this case was the owner of oil tank cars which were delivered to it at interchange tracks from which the loaded cars were taken to the complainant's private tracks located upon its own land. The complainant contended that it should be relieved from demurrage upon its own cars when standing upon its own tracks within its own works," but the Interstate Commerce Commission held that the carriers were within their lawful rights in collecting demurrage upon such cars thus located.

Although it is clear that both the framers of the demurrage rule in question and also the Interstate Commerce Commission which has passed upon the rule are of opinion that demurrage should be paid upon private cars received upon tracks belonging to the owners of the cars, the decision of the Interstate Commerce Commission in *Proctor & Gamble Co. v. Cincinnati, Hamilton and Dayton R. R. Co., et al.*, which was sustained by the United States Commerce Court, is not determinative of the cause

at issue in the present case. The reasoning of the Interstate Commerce Commission, in part, was

"Manifestly, the law does not impose upon defendants the obligation of hauling complainant's private cars. If used, it must be under an arrangement which is subscribed to by both, and which is stated definitely in defendant's tariffs. These defendants have said in their tariffs that they will use the privately owned cars and pay three-fourths of one cent per mile for such use, and will subject them to the demurrage rules. Complainant, having its cars in use under these conditions, now asks that we relieve it from one of the conditions, which defendants are unwilling to relinquish."

The case at issue before the Public Service Commission of Pennsylvania differs from *Proctor & Gamble Co. v. Cincinnati, Hamilton & Dayton R. R. Co., et al.*, in that the respondent carrier is obliged by its charter to permit shippers to place upon its rails their own freight cars intended for the transportation of their own and others, freight. The carrier is obliged to accept private cars offered by shippers. While the carrier may lawfully require the owner of the car to pay an adequate compensation for hauling the cars, it would seem that the carrier could not stipulate, as a condition of accepting the cars for transportation, that the shipper must pay demurrage upon his cars when standing upon his own tracks. It is our opinion that the complainant in this case is acting within his lawful rights in objecting to the payment of demurrage.

The cars upon which the respondent seeks to collect demurrage are used solely by the complainant in transporting coal from the complainant's coal tipple to his factory three-fourths of a mile distant. The carrier is obliged by its charter to haul the cars and for the service it is thus required to perform it receives a presumably reasonable compensation.

It is our opinion that the private cars of the complainant can not be considered to be "in railroad service." In reaching this decision no opinion is expressed as to the legality or wisdom of the application of demurrage rules to private cars as they are ordinarily employed in transportation service. The peculiar facts of the instant case together with the charter obligation of the car-

rier to haul private cars justify the complainant in refusing to pay the demurrage sought to be collected by the respondent.

If it could be held that the complainant's cars are legally "in railroad service," it would not be fair to the complainant to require him to pay the demurrage demanded by the respondent. For the transportation of coal three-fourths of a mile the carrier receives the liberal rate of 15 cents a ton and has practically no expense for the cars used. The car-mileage of six mills per car mile which the carrier pays the car-owner amounts to only nine mills for a round trip from the coal mine to the glass factory and return. The complainant's cars apparently earn car-mileage of about one-fourth of a cent a day. If the respondent railway company transported the complainant's coal in a car belonging to another railroad company, a per diem of 45 cents would be paid the owner of the car; and if the complainant used its own equipment the expense would probably equal 45 cents per car per day. To require the complainant, who receives practically nothing for providing the equipment in which his coal is transported, to pay demurrage upon his cars after they have been received upon his own sidings, would be to discriminate against the complainant and to place him at a disadvantage in comparison with consignees who receive coal in railroad-owned equipment and also in comparison with consignees who own private cars that yield a substantial car-mileage revenue.

It is our opinion that the prayer of the petitioner should be granted, and that the respondent should be ordered so to modify his tariffs as to exempt the complainant's cars from demurrage when standing upon the complainant's private tracks.

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#### BOROUGH OF MT. UNION *v.* MT. UNION WATER CO.

*Water companies—Rates—Reasonableness of—Fair return—Perpetual contract with borough prescribing rates—Effect of—Impure and insufficient supply.*

The Borough of Mt. Union complains (1) that the respondent, the Mt. Union Water Co., on July 1, 1914, increased its rates in violation of the terms of an ordinance under which it enjoys its franchise, (2) that the rates now charged are unreasonable and excessive, (3) that the water sup-

plied is of poor quality, and (4) that the pressure is inadequate for fire protection.

The evidence showed (1) that the ordinance referred to, which fixes the rates to be charged in the borough, is a perpetual one, (2) that under the new rates the return upon the company's investment at the valuation placed upon it by the borough is 5.84 per cent., and at the company's valuation is 3.6 per cent., (3) that, owing to causes which could be easily remedied, the water was at times deficient in quality and inadequate for fire protection.

*Held:* 1. The contract between the borough and the water company being for an indeterminate and uncertain time, the company, under the ruling of the Supreme Court in *Bellevue Borough v. Ohio Valley Water Co.*, 245 Pa. 114, is not bound to maintain the schedule of rates therein.

2. The new rates of the company are not unreasonable as they do not yield to the company the minimum return of 6 per cent. allowed by the ruling of the Supreme Court in *Brymer v. Butler Water Co.*, 179 Pa. 231, and *P. R. R. v. Phila. County*, 220 Pa. 100.

3. The company shall take such steps as to secure an adequate supply of pure water for all purposes and report to the Commission the character of the improvements and the results of its tests.

#### COMPLAINT DOCKET No. 271.

#### Report and Order of the Commission.

*Chas. E. Hower* and *James S. Woods*, for complainant.

*Thomas F. Bailey* and *Samuel I. Spyker*, for respondent.

#### COMMISSIONER BRECHT:

In its original form and as subsequently amended, the complaint of the Borough of Mount Union against the Mount Union Water Company, sets forth that in a schedule of rates issued July 1, 1914, effective August 15, 1914, the respondent company increased its rates; that the proposed rates are in violation of the terms of the ordinance under which respondent is permitted to operate a water plant in the municipality of Mount Union; that the rates under the new schedule are unreasonable and excessive; the "water supply furnished \* \* \* is insufficient in amount and deficient in quality"; and that the supply of water furnished by respondent to the Borough of Mount Union is not "adequate in pressure or amount for the protection of said borough from fires."

It appears from the record that on July 27, 1900, a franchise was granted to Edgar B. Kay, his associates or assigns, to construct and operate a plant to supply water to the inhabitants of Mount Union. The respondent in this proceeding, the Mount Union Water Company is the successor under the above ordinance to Edgar B. Kay, his associates or assigns. The ordinance among other things specified that at the end of ten years after the water is installed, the borough authorities shall be empowered to purchase the water works, if satisfactory terms can be agreed upon, and in case the purchase is not then made, the right to buy shall inure to the said borough every five years thereafter; that the annual rates to private consumers shall not exceed the schedule of rates which are set forth in detail in Section 16 of the said ordinance; and that the water pressure is "to be sufficient to throw a stream ninety feet high at the crossing of Jefferson and Market streets, when tested through a two and one-half inch hose, fifty feet long, attached to a hydrant and having fitted to it a one-inch nozzle."

In the answer of the respondent it is averred that the rates fixed in its schedule of July 1, 1914, are not unreasonable and excessive; that the value of "the plant and property of all sorts of the Mount Union Water Company is \$140,000 and that at the rates fixed by schedule of July 1, 1914, the gross annual income will be \$11,000, \* \* \* that the annual cost of operation," including State tax, annual depreciation of  $1\frac{1}{2}\%$  on the value of the property, amounts to \$5,610, "leaving a net return upon the value of the plant fixed at \$140,000 of \$4,390, or 3.14% upon the investment"; that the franchise which the borough had granted to Edgar B. Kay and his assigns was not limited to ten years or any other definite period of time, but was "indeterminate and uncertain" as to the length of time the contractual relations of the parties would remain in effect; that the respondent "is under no legal liability under the franchise contained in the ordinance of the 27th of July, 1900, to maintain the schedule of rates fixed therein, provided such rates do not furnish an adequate return to the company based upon the value of its plant, for the reason that the contract as to the said rates \* \* \* is unlimited as to time, and is co-extensive with the grant, \* \* \*," that the water



furnished to the Borough of Mount Union is "sufficient in quantity and reasonably pure in quality," and that the pressure of water for "fire protection is fully sufficient and adequate."

There are four questions raised in this issue: (1) Is the advance made in the rates of the schedule of July 1, 1914, effective August 15, 1914, a violation of the ordinance of July 27, 1900? (2) Are the rates of the aforesaid schedule unreasonable and excessive? (3) Is the supply of water furnished to the Borough of Mount Union insufficient in quantity and inferior in quality? (4) Is the water pressure not adequate and sufficient to afford proper fire protection to the said borough?

(1) Was it a violation of the ordinance to increase the rates? It is admitted by counsel of complainant that if the contract ordinance of July 27, 1900, is perpetual, then under the ruling of the Supreme Court in *Bellevue Borough v. Ohio Valley Water Company*, 245 Pa. 114, the schedule of rates prescribed in the ordinance is not binding upon the water company and may be increased. The franchise ordinance which was passed by the Borough of Bellevue and the ordinance now under consideration passed by the Borough of Mount Union use substantially the same language and specify the same terms and conditions when dealing with the question of rates. Both ordinances provide for the purchase of the plants by the respective boroughs after a certain specified time, or thereafter at the end of any five year period in precisely a similar way and manner.

In its opinion in the *Bellevue Borough* case in 245 Pa., the Supreme Court at page 117, in referring to *Turtle Creek Borough v. Pennsylvania Water Company*, 243 Pa. page 415, says:

"We did decide in that case that a contract of this kind, unlimited by its terms, and hence indeterminate as to time, could not be enforced indefinitely, and must give way to the general policy of the law under which the legislature created a special tribunal to pass upon and determine questions relating to the reasonableness of rates charged by public service corporations. The learned court below in the present case very properly followed the decision in that case and held that the Borough of Bellevue could not enforce through the courts a compliance with the rates thus established."

The same construction as to rates must apply to the contract

franchise involved in the present proceeding, and therefore, the increase of rates by respondent cannot be regarded as a violation of the terms and conditions of the ordinance under which the water company is operating.

(2) Are the new rates unreasonable and excessive? The complainant and respondent both offered expert testimony on the physical valuation of the water company's plant. Mr. Zentmyer, expert engineer for complainant, testified that he would fix the value of the plant of the Mount Union Water Company for rate making purposes at \$93,044.14. This estimate does not allow anything for depreciation, but includes the sum of \$5,000 for interest during course of construction, and going value.

Mr. Dillman, another expert witness for complainant, testified that he had made a careful inventory of the plant and after applying unit prices, this witness fixed the reproductive value of the property at \$92,000. This estimate, however, does not include anything for going value or interest during course of construction.

The experts called on behalf of the respondent fixed the valuation of the plant, both by the reproductive and the historical method, at approximately \$150,000. These calculations include items for interest during the course of construction, depreciation of plant, and going value. Under the historical or original cost theory the going value of the plant was fixed at about \$45,000. The special values under the reproductive theory were placed in round numbers at \$25,000. The value of the property for rate making purposes was put at \$150,000. It is held to be proper by courts and public utility commissions in determining the value of water plants for rate making purposes to allow a certain percentage for depreciation, interest during the period of construction, and a certain amount for the cost of establishing the business.

The gross receipts of the water company according to the testimony of two witnesses of complainant who made a careful canvass of the water consumers in Mount Union, amount to \$11,-972.62 per annum. Of that amount it is set forth that the sum of \$9,702.62 is derived from domestic consumption. Under the rules of the company 10% of that amount or \$970.26 must be deducted for cash payment of bills. The actual gross receipts of

the company for the year therefore according to the figures of complainant amount to \$11,002.36. The gross annual income as shown by the reports of respondent's experts is \$10,700 or within \$300 of the amount submitted by complainant. As the witnesses for complainant who tried to ascertain the receipts of the company were not infrequently obliged to get their information from tenants who had no receipts and a very imperfect knowledge of the amount of water rent paid for their respective residences, it is safe to assume that the figures given by the respondent's experts on this matter are more accurate and reliable, since the latter had access to the books and accounts of the water company.

The operating expenses of the water company, according to the testimony of Mr. Africa, expert witness for respondent who has been acquainted with the plant since its inception, amount to \$5,310 per year. Items were submitted in detail in Mr. Africa's report to show how the sum given was expended in the operation of the plant. No testimony was offered by complainant to show that the amounts paid for the various items enumerated in the aforesaid report were high or exorbitant. Under the new rates, therefore, the net income of the company was found to be about \$5,400 per year.

From the foregoing figures the rate of net income per annum on the different appraisals given is readily computed. If it is assumed that Mr. Zentmyer's appraisal of \$93,044.14 represents the true value of the plant, on a net return of \$5,400, the rate of income will be 5.84%. If a nominal item of \$10,000 be added to the estimate of Mr. Zentmyer to cover depreciation and going value, the rate of income earned will be 5.24%. Mr. Dillman's valuation of \$92,000, if increased by \$5,000 for interest during course of construction, and \$10,000 for depreciation and cost of establishing the business, would yield 5.13% income. On the valuation submitted by experts of respondent, the annual rate of earning would net but 3.6%.

It has been held by the Supreme Court of Pennsylvania that a public utility is entitled to earn at least the legal rate of interest, or 6%. In the *Brymer v. Butler Water Company*, 179 Pa., 231, the Supreme Court held:

"They are entitled to a rate of return, if their property will earn it, not less than the legal rate of interest; and a system of charges that yields no more income than is fairly required to maintain the plant, pay fixed charges and operating expenses, provide a suitable sinking fund for the payment of debts, and pay a fair profit to the owners of the property, cannot be said to be unreasonable."

In *Penna. R. R. Co. v. Phila. County*, 220 Pa., 100, the Supreme Court took occasion to say:

"What was said in *Brymer v. Water Company*, 179 Pa., 231, was that: The company was entitled to a fair return, not less than the legal rate of interest. In naming the legal rate the court was naming a minimum, not a maximum rate. Six per cent. is the legal estimate of the legitimate profit from the ordinary safe use of money."

From complainant's own valuations in this case it has been shown that respondent's rate of income is less than the annual rate of interest. And since all the other testimony appearing upon the record, bearing directly or indirectly upon the question of rates, tends to show a lower rate of gain than complainant's figures, the Commission is not justified in finding that the rates of respondent are unreasonable and excessive.

(3) Is the water supplied insufficient in quantity and unfit for domestic use? The Borough of Mount Union has a population of about 4,000 people, and is situated on the slope or side of the mountain, along the Juniata river. Owing to its location there is a considerable difference in the elevation of the houses between the lower and higher points of the town, and naturally a perceptible difference in the water pressure on streets in the low and high parts of the borough.

The water supply for Mount Union is taken from three or four sources on the slopes north and south of the Juniata river. The water is supplied by gravity from reservoirs having ample storage capacity to supply all the needs, domestic and commercial, of the community, the size of Mount Union. The water is not filtered nor treated but flows directly from the reservoirs into the pipes leading into the distributing system of the town. From the testimony offered it appears that the pipes installed are sufficient in size to carry an adequate supply of water.

It is testified, however, that there was an insufficient flow of water on the higher streets and places of the town from about July, 1914, to the following December; that when water was drawn it did not come with any force in the lower parts of the town; that people complained about July, 1914, that the water had a "bad color and a bad taste," and was full of sediment; that tests made in August, 1914, and November, 1914, showed a pressure below that specified in the ordinance under which respondent is furnishing service, and that the attention of the State Department of Health was called to the condition of the water some time in July, 1914.

Mr. Ira F. Zeigler, an inspector for the State Health Department, inspected the Singer's Gap supply on August 12, 1914, and "found the supply in pretty bad shape, in that it was receiving drainage from the highway for a distance of about a mile and a half." It was raining "pretty severely" at the time, and at several places the surface water was washing cow and horse faeces "almost directly into the water" of the stream. Samples of water were taken that morning from the Singer Gap reservoir and from the pipes in the town, and all, on analysis, showed the presence of sewage. As a result of this inspection, the State Health Department notified the Mount Union Water Company to treat the water with hydro-chloride of lime.

Mr. Morris Knowles, a civil engineer and expert for respondent, testified that he made an analysis of the water supplied by the Mount Union Water Company on four different occasions. Samples were collected on December 1, 1914, December 16, 1914, January 7, 1915, January 18, 1915, and the analysis made shows "good, potable water, with no injurious ingredients in it." He also testified that he had made an examination of the water-shed, and reached the conclusion that the water supply is "ample for the Borough of Mount Union for some time to come."

From the evidence submitted it appears that the scarcity of water complained about prevailed principally during the latter half of 1914. Whatever trouble existed in that phase of the service prior to 1914, was confined more or less to isolated cases in the more elevated portions of the town that could be ascribed to some special cause. The service from Singer's Gap was installed

in November, 1913, and since it furnishes about half the present supply for the borough, as testified by the president of the Mount Union Water Company, it would seem that the low pressure in the water plant during the summer and fall of 1914, after the capacity of the plant was approximately doubled, was due in large measure to the general drought that prevailed throughout the State at that time.

The exceptionally low pressure found on August 5, 1914, and November 7, 1914, when tests were made by witness for complainant, are fully explained by the testimony of the president of the water company. His evidence sets forth that on those particular days and on July 15th of that summer, the valve in the 8-inch main pipe from Singer's Gap had been shut off, as was learned afterwards, by one of the farmers in that section, to divert the water down stream which was beginning to run dry on account of the drought. After the valve was shut off a second time, counsel for respondent sent a notice to the party, and since then the company has had no further trouble in the matter.

It should also be observed that the quality of the water was complained against chiefly during the summer of 1914. The record shows that the pipe line to Singer's Gap was put into operation in November, 1913. The new line is practically five miles long, and in its construction the joints were treated to a tar preparation which gives the water running through the pipes the odor of oil or tar. It would naturally take some time before all traces of that odor would disappear entirely, and therefore some of the "bad taste and bad odor" present in the water during the summer of 1914, may be ascribed to the condition of the new pipe line from Singer's Gap.

The report of the inspector for the State Department of Health indicates quite clearly that there is not the proper vigilance exercised by respondent in protecting the stream and approaches of the reservoir at Singer's Gap from pollution. Such a situation as was described by the health officer shows serious neglect of a grave public duty. An order will be issued upon the respondent to take proper steps to remove all sources of contamination from its water supply, and to set forth in its report to the Commission

the scope and character of the means employed to accomplish that end.

(4) Is the water pressure adequate to afford proper fire protection? The ordinance under which the company operates requires a pressure that will throw a stream ninety feet high under certain specified conditions at the crossing of Jefferson and Market streets, in Mount Union. Testimony was given by the Fire Chief of Mount Union, that on August 5, 1914, at a fire which occurred at one of the lowest points in the borough, he was unable to get any pressure; that on November 7, 1914, he made a pressure test, and found that on Market street he could get a stream only forty feet high. The record shows that the times here mentioned were the days on which the respondent found the valve on the 8-inch main from Singer's Gap closed, thereby cutting off approximately one-half of the water supply to the borough.

The fire chief also testified that on September 25, 1914, a fire, known locally as the Walker-Appleby fire, broke out in one of the lower portions of the town, and that he was apparently not able to get more than a 15-foot pressure. His testimony was corroborated by other witnesses. In his testimony upon this particular fire, the president of the water company said the stream about which the witnesses were testifying at the above fire was weak and not sufficient for the purpose, but it was wholly due to the extra long line of hose used, which was leaking freely at every joint. There was another stream, the president testified, playing upon the fire from a plug 75 feet away that was strong enough to require three men to hold the nozzle, and by means of which the house next to the one burning, 10 or 15 feet away, was saved.

Since the hearing was held a test was made, at the request of this Commission, by the engineer for the water company and the engineer for the Borough of Mount Union, of "the pressure of the water on the lines of the Mount Union Water Company at the corner of Market and Jefferson streets, \* \* \* with the following results: At 3:45 p. m., on a clear day, southwest wind, through a fifty foot, 2½-inch rubber hose, and a one-inch nozzle, a stream was thrown vertically one hundred and eight and seven-tenths (108.7) feet. The test was satisfactory to the complainant as applying to this season of the year, but as the streams are

full in April, the complainant asks that other tests be ordered by the Commission to be made "later in the year when there is the usual dry weather."

From the facts submitted in the testimony, the Commission finds:

(1) That the respondent did not violate the franchise ordinance under which it operates when it increased the rates.

(2) That the rates in the schedule of July 1, 1914, effective August 15, 1914, are not unreasonable and excessive.

(3) That the quantity of water supplied by respondent is adequate and sufficient for domestic consumption.

(4) That the stream and reservoir at Singer's Gap must be properly protected against pollution and contamination from surface drainage off the adjacent public highway, and all other slopes, approaches and places set forth in the record, and that respondent take proper steps to secure that end.

(5) That respondent report to this Commission not later than July 1, 1915, the scope and character of the means employed at Singer's Gap to safeguard the purity of the water.

(6) That tests of the pressure of the water on the lines of the respondent as specified in the borough ordinance be made by the engineers of the water company and the borough in the months of July, August, September and October, 1915, and that the result of each test be reported to the Commission within ten days after the test has been taken.

An order will be issued in accordance with the aforesaid finding.

#### ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

*Now, to-wit, May 20, 1915, It is ordered:*

(1) That the Mount Union Water Company properly protect



the stream and reservoir at Singer's Gap against pollution and contamination from surface drainage off the adjacent public highway and all other slopes, approaches and places set forth in the record of this case and report to this Commission, not later than July 1, 1915, the scope and character of the means employed at Singer's Gap to safeguard the purity of the water.

(2) That tests of the pressure of the water on the lines of the Mount Union Water Company, as specified in the ordinance of the Borough of Mount Union, be made by the engineers of the water company and the borough, in the months of July, August, September and October, 1915, and that the result of each test be reported to this Commission within ten days after the test has been taken.

(3) That the complaint in this case be, and the same is hereby dismissed, save as to matters provided for in this order.

By the Commission:

SAMUEL W. PENNYPACKER, *Chairman*.

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J. S. ELLIOTT, ET AL., v. BIG SPRING ELECTRIC CO.

*Rates—Increase on one branch of service—Evidence.*

The respondent company filed tariffs March 23, 1915, increasing the rates for power service in the Borough of Newville, and contended at the hearing that this service had heretofore been rendered at a loss. The evidence showed that interest on the bonds of the company had been paid and a 6 per cent. dividend had been declared in 1912. There was no evidence that the condition of the company had materially changed since that time; nor was the cost of, or revenue from, the power service alone, shown by the company.

*Held:* The respondent should be restrained from putting the new schedule of rates into effect. When the item of power service can be separated from the rest of the business and the net earnings of that service clearly shown, due consideration should be given to this branch of service in rate making, but in this case this was not done and no material evidence was presented showing any necessity for the increase.

COMPLAINT DOCKET No. 366.

Report and Order of the Commission.

S. B. Sadler, for complainants.

*E. E. Beidleman*, for respondent.

COMMISSIONER BRECHT :

This complaint alleges that in a notice received by complainants from the respondent, the Big Spring Electric Company, under date of March 1, 1915, effective April 1, 1915, the rates for power are "largely increased"; that the rates proposed "are greatly in excess of the charges of other companies for like service"; and that "the said excessive rates \* \* \* \* are in violation of the agreements made and \* \* \* \* for the purpose of rendering impossible the continuance of the use of power by the consumers, which would cause great loss and injury to them." The rates involved in the complaint were subsequently published by respondent under date of March 23, 1915, effective April 23, 1915.

The respondent avers that under the old rates the company furnished power at less than cost; that it imposes extra cost upon the company to furnish complainants' power service, and that the new schedule of rates "will not permit of one cent profit in this class of business; but will more nearly recompense the company for its actual extra cost" of furnishing the service than the old rates did.

Complaint was brought in the first instance because of some trouble that grew out of the character of the current furnished for power to some of the consumers. In that connection it was alleged that the irregularity or lack of uniformity in the current furnished, caused serious loss to one of the complainants who is engaged in the business of roasting coffee, and that when the company was notified that a claim would be made upon it for damages, if the current supply would not be made more uniform, the respondent issued a notice on February 4, 1915, to its consumers that on and after March 15, 1915, the Big Spring Electric Company would cease to supply any current whatsoever for power purposes. Thereupon a complaint was filed before this Commission protesting against the discontinuance of furnishing power entirely, and requesting that the company be restrained in the matter. An order was accordingly issued upon the company by this Commission to the effect that the said company could not arbitrarily discontinue furnishing power as long as it contemplated

using the powers granted by its charter. About that time, or immediately thereafter, notice was given by respondent that the rates for power current would be increased by publishing its schedule of March 23, 1915, effective April 23, 1915.

The Big Spring Electric Company was chartered in 1907, and in February, 1908, it secured a franchise authorizing it to occupy the streets, alleys and public grounds of the Borough of Newville, Cumberland County, Pennsylvania, for the purpose of furnishing light, heat and power to that municipality. The franchise ordinance under which the said electric company is operating provides for certain maximum rates for light, but specifies no rates that are to be charged for power furnished. The plant was installed in 1908, and both light and power were furnished thereafter to consumers. The rates for power were fixed at four cents per killowatt-hour, and a minimum charge of fifty cents per horse-power was established. Under that schedule power was furnished until in the spring of 1915. Under the new schedule, effective April 23, 1915, the rate for power is fixed at 5½ cents per killowatt-hour, and a minimum charge of \$1.50 per horse-power per month made when the total rated current of the consumer is above two horse-power, and when two horse-power or less, a minimum charge of \$3.00 per month.

Complainants testified that some years ago they were approached by officers of the company and solicited to install electric motors instead of the steam and gasoline engines which they had been using; that they were given verbal assurances that the rates for power then in effect would not be increased thereafter, and that upon the strength of the representations made to them, they disposed of their engines and boilers and installed electric motors.

Mr. Charles W. Harmon, a former secretary of the respondent corporation, admitted that in 1912 the interest on the bonds was paid, and a 6% dividend declared and paid on the capital stock. Mr. S. M. Kitzmiller, a director of the electric company, stated in his testimony that it was not contended that the business of the company as a whole is not profitable, but it is contended that the portion of the business which had to do only with the furnishing of power service, is unprofitable, "because it is costing us twice the amount to do this business that we are getting from it." The

manager of the company testified that there is no additional help employed or required at the plant, nor anywhere else to supply current for power.

The testimony does not show what the receipts were under the old rates, nor what they would probably amount to under the new rates, nor does it contain any figures which show what the expenses were under the old rates for maintaining the power service. This it seems clearly should have been shown by respondent and should have been possible to demonstrate, if respondent's contention, that the power service is furnished at a loss, is correct. The fact that it was not shown is practically tantamount to an admission that when the same wires, machinery, employees, and current are employed in furnishing light and power, and especially during the same hours of the day, as may be the case at Newville under the franchise requirements of the respondent, it may prove to be too difficult a matter to segregate the power service from the whole business and determine its cost for a given period like a year. However, where this item of service can be separated from the rest of the business and the net earnings clearly shown, a proper protection of all interests concerned will require that due and careful consideration be given to this branch of the service in rate making, for rates either for power or light, may be too high or too low to provide legitimate returns.

There was also no material evidence submitted to show why the respondent company found it necessary to advance its power rates in April, 1915. It appears from the record that the Big Spring Electric Company paid two dividends of three per cent. each in 1912. Its capital stock and bond issue then were each \$15,000. The company changed hands some time in 1912, and in due course the new corporation authorized a capital stock of \$100,000, and a bond issue for \$100,000. No new stock having ever been issued, the capital stock remains to-day at \$15,000; of the new bonds, \$50,000 were issued, making the total outstanding bond issue now \$65,000. The first \$20,000 of the new issue were sold at par and interest; the next \$30,000 at 90 and interest.

In his testimony to show how the proceeds of nearly \$50,000 obtained from the bond sale, were expended in plant property and facilities, the manager of the company could account for only

\$8,000 of \$10,000 that were spent upon additions and improvements since the present company acquired the property in 1912. Mr. Kitzmiller, who sold the bonds and who is one of the directors of the company, set forth in his testimony that about \$12,500 were expended upon the property of the plant since 1912, not including the purchase of 24 acres of land for which, on account of its "strategic" importance to the company, an "exorbitant" figure had been paid. It appeared that the consideration named in the deed for this piece of real estate was \$1,000, but that sum was merely a nominal figure, the actual consideration being "considerably more," but witness was not able to recall how much was paid for the tract in question.

It is admitted in the testimony of the respondent that the business was conducted at a profit in 1912 when the old rates were in effect. Since then the bonded indebtedness of the company has been increased \$50,000, but apparently only about one-third of that amount invested in the property. The improvements that have been made have added to the revenue not only in the Borough of Newville, but also in securing the Cumberland Valley Railway Company as a patron. The major portion of the investment appears to have been made for extensions and facilities to supply current to the Cumberland Valley Railway Company, and therefore, the proportion of receipts to legitimate expenses in the Borough of Newville remain practically about the same as in 1912.

As the status of respondent's business has not changed materially since a 6% dividend was declared, and as the respondent failed to show that current for power was furnished at a loss under the old rates, an order will be issued restraining the respondent from putting into effect the proposed schedule providing for an increase in its rates for power on and after April 23, 1915.

#### ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions

thereon, which said report is hereby referred to and made a part hereof :

*Now, to-wit, May 20, 1915, It is ordered:* That the Big Spring Electric Company shall desist and refrain from collecting any and all charges and rates provided for in the schedule of tariffs of the said company designated as P. S. C. No. 2, filed March 23, 1915, and effective April 23, 1915.

By the Commission :

SAMUEL W. PENNYPACKER, *Chairman.*

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PETITIONS OF EAST END ELEC. LIGHT, HEAT & POWER CO. AND  
RELIEF ELEC. LIGHT, HEAT & POWER CO.

*Approval of contracts—Competition—Satisfactory service by  
company now operating.*

Under Article V, Section 18, of the Public Service Company Law the approval of ordinance contracts between municipalities and public service companies, which is required by Article III, Section 11, of the said act, "shall be given only if and when the Commission shall find or determine that the granting or approval of such application is necessary or proper for the service, accommodation, convenience or safety of the public."

Where there is no evidence presented to show that the service now rendered to the public in the territory proposed to be served by the applicant is inadequate, or that the rates charged are unjust, unreasonable, or otherwise improper, and where there is positive evidence that both the service and rates are adequate, just and reasonable, approval of an ordinance contract granting applicant the right to furnish service in a territory now supplied with such service will be refused.

MUNICIPAL CONTRACT DOCKET NOS. 312 AND 313, 1914.

Report and Order of the Commission.

*Thomas Patterson and Andrew M. Linn, for applicants.*

*W. E. Crow and David I. McCahill, for protestants.*

COMMISSIONER WRIGHT :

Two separate petitions for Certificates of Public Convenience were filed in these cases, one by the Relief Electric Light, Heat and Power Company for such certificate evidencing the approval of an ordinance contract between it and the Borough of Washing-

ton, and the other by the East End Electric Light, Heat and Power Company for such certificate, evidencing the approval of a similar contract between it and the adjoining Borough of East Washington. After several continuances granted by the Commission, at the request of counsel for the petitioners and for the West Penn Lighting Company, which latter was a protestant, the two petitions involving the same or similar inquiries were, on March 17, 1915, heard by the Commission together. At the hearing, petitioners offered no evidence to show that the granting of the applications for the approval of said ordinance contracts was necessary or proper for the service, accommodation or convenience of the public beyond that which inhered in the circumstance that the petitioning companies had both been duly created under the corporation laws of the Commonwealth on June 26, 1912, before any of the provisions of The Public Service Company Law of July 26, 1913, became effective, and that afterwards, to wit: May 26, 1914, the ordinance of the Borough of Washington permitting the Relief Electric Light, Heat and Power Company to use and occupy the streets of said borough, upon the terms and conditions in the ordinance set forth, was approved, and that on June 8, 1914, the similar ordinance granting like permission to the East End Electric Light, Heat and Power Company was also approved. In both said petitions for the approval of these ordinance contracts, it is set forth that the application is made "under Section 11, Article III, of The Public Service Company Law," which is the section which provides that "No contract or agreement between any public service company and any municipal corporation shall be valid unless approved by the Commission, etc." It is further set forth that the petitioning company in both the Borough of Washington and the Borough of East Washington will "compete with the West Penn Lighting Company, a Pennsylvania corporation, whose principal office is in the City of Pittsburgh," and that "petitioner is advised and believes that it has authority under said charter and local consent to proceed to exercise its charter rights to furnish electric current for light, heat and power, to persons and corporations within the territory covered by said charter, subject, nevertheless, to the approval by

your Commission of the terms and conditions prescribed in the ordinance granting such local consent."

At the hearing, the petitioners offered in evidence their charters of incorporation and the said ordinance contracts, and then rested their case upon the grounds, substantially, that said petitioning companies having, as above stated, been incorporated prior to the enactment of The Public Service Company Law, and having secured the local municipal consent to the use of the streets in said boroughs, that the Certificates of Public Convenience evidencing the approval of said ordinance contracts should be issued by the Commission.

Section 18 of Article V, of The Public Service Company Law, prescribes the conditions under which this Commission may grant the approval of applications such as the present ones. It provides that they "shall be given only if and when the said Commission shall find or determine that the granting or approval of such application is necessary or proper for the service, accommodation, convenience or safety of the public."

No evidence was adduced at the hearing tending to show that the service now being rendered to the public in the Borough of Washington and the Borough of East Washington was inadequate, or that the rates being charged for such service were unjust or unreasonable, or otherwise improper. No complaint as to either the service or rates of the West Penn Lighting Company has been made. On the contrary, there was positive evidence that both the service and rates were adequate, just and reasonable.

After careful consideration of the petitions, the grounds upon which they are based and all the evidence in the cases, it is the judgment of the Commission that the approval of said petitions is neither necessary nor proper for the service, accommodation, convenience or safety of the public, and that, conformably to the principles which we have announced in former cases,\* the approval and certificates of Public convenience applied for should be withheld, and an order will be made accordingly.

\* See Schuylkill L. H. & P. Co.'s Petition, 1 P. C. R. 122; Application of Harmony Electric Co. ante p. 42; Borough of Exeter's Petition, ante p. 52; Borough of Avoca's Petition, ante p. 372.



**ORDER.**

These cases being at issue upon petitions and protests on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its finding of fact and conclusions thereon, which said report is hereby referred to and made a part hereof :

*Now, to-wit, May 19, 1915, It is ordered:* That the Certificates of Public Convenience evidencing the Commission's approval of the ordinance contracts referred to in said petitions be withheld, and the petitions be, and the same hereby are dismissed.

By the Commission :

SAMUEL W. PENNYPACKER, *Chairman.*

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COMBINED COMMITTEE OF THE UNITED BUSINESS MEN'S ASSOCIATION OF PHILADELPHIA, ET AL., *v.* PENNSYLVANIA RAILROAD CO., ET AL.

*Practice before Public Service Commission—Rehearing—Modification of order—Power of the Commission to prescribe fares—Comparison of rates.*

1. Where a petition is presented praying for a reopening and rehearing of a case decided by the Commission, and on hearing held upon the petition it is not shown that any additional testimony is to be presented, the Commission will not reopen the case, but it may modify its original order.

2. Without the taking of additional testimony such a modification in an order will not be made as to require carriers of passengers to issue a ticket which they were not issuing at the time of the original hearing.

3. The Commission clearly has the power to prescribe a reasonable maximum fare; and, having the power to classify rates, it can presumably prescribe different maximum fares for different classes or kinds of passenger service; but the power to prescribe for any particular ticket a schedule of charges worked out on a "per station" system, is not specifically granted by the statute. The Commission cannot prescribe a schedule of absolute fares to be charged at successive stations. If it goes further than to fix a single maximum rate per mile, within which the charges for a particular ticket shall be sold, it must establish a series of maxima varying either per station or by some scheme of fare zones.

4. The weight given to comparisons of comm districts of two different cities depends upon th as regards expense of service, volume and co other factors affecting the reasonableness of ch

For original order see ante p. 262.

For original opinion see ante p. 390.

## COMPLAINT DOCKET N

### Supplemental Opin

#### COMMISSIONER JOHNSON:

Following the determination by the the Combined Committee of the Unite tion of Philadelphia, et al., v. the P any, Philadelphia and Reading Railw more and Ohio Railroad Company, [r December 14, 1914, was filed by th Committee of the United Business delphia and the Commuters' Associ tion of the Commission's finding an

On the 18th of December, 1914, 8, 1915, for hearing argument upc January, 1915, a petition was filed sociation of Bryn Athyn, Hunting nut Hill, Paper Mills, Woodmont dow Brook praying the Commi into the propriety of the establis' ule now on file with the Comm quiring the respondent (the Pl Company), to restore 26-trip charged for single trips and ret to the change that was made i/ ber." The other complainant tion for a modification of th but some of them appeared r of January, 1915.

Counsel for the Germantc Association presented an ar taking of additional testim

was also presented by counsel representing the Board of Trade of Chester and certain other organizations.

The counsel for the United Business Men's Association and for the Combined Commuters' Association did not join in the request for a rehearing, but argued in favor of a modification of the Commission's order based upon the facts of record. The request made by this counsel was for "three things from the record: First, that it extend the time (of the validity of the 100-trip tickets), from six months to a year; secondly, that this maximum basis (of a charge of  $1\frac{1}{2}$  cents per mile), be changed and a zone limit be established at the maximum basis, and that the companies be compelled to go back to the old per station system, as now followed, in the 60- and 46-trip tickets—that is, at 25 cents per station, or 50 cents per station," and that "Philadelphia be given the same consideration by the Pennsylvania Railroad Company and by others as is afforded to commuters in and out of the City of New York and elsewhere." [Record of hearing, Jan. 8, 1915, pp. 98-99.]

In reply to the petitioners, the counsel for the Pennsylvania Railroad Company argued that the Commission was without power to order the railroads to sell a particular kind of ticket. It was also argued by the counsel for the Pennsylvania Railroad Company and for the Philadelphia and Reading Railway Company that the charters of those companies give their directors the power to fix rates and fares subject only to the maximum charges named in the charters. The counsel for the Pennsylvania Railroad Company announced that if the Commission reopened the case, his company would defend "its original program," that is, would defend the rates that were filed on the 14th of November and which would have become effective on the 15th of December, had they not been held by the Commission to be unreasonable. Announcement was also made by counsel for the Pennsylvania Railroad Company that if the company's "revenues are to be reduced by further reduction of the passenger rates, then we reserve to ourselves the right to challenge the power of anybody, under the law, as it exists to-day, to provide how we shall charge for the service that we render." The counsel for the Philadelphia and Reading Railway Company stated "that if, in the wis-

dom of the Commission, it should feel justified in reopening the case, we must then reserve the right to stand on our rights secured to our company under the constitution and under the law."

Concerning the legal questions raised by the respondents in the brief and oral arguments presented at the hearing of January 8, 1915, no opinion need be expressed, for the Commission does not deem it necessary to reopen the case for the purpose of taking additional testimony. The counsel for the Germantown and Chestnut Hill Improvement Association who made the principal argument for the rehearing, was not able to state any definite facts or evidence to be presented, if additional testimony were taken. When asked the questions, "Have you other facts to present? Are you prepared to show that the facts were too limited upon which the decision was first based?" his reply was that he had no facts at that time, but he stated that "We think that we have other facts—we do not know—which, if given an opportunity—we can collate and present to you with respect to distance, with respect to cost of service, with respect to revenue and with respect to value of the service performed." [Record of hearing Jan. 8, 1915, p. 37.]

The counsel representing the Board of Trade of Chester, also argued for a rehearing of the case; but his prayer was, in reality, for a modification of the Commission's order upon the facts of record; for he stated "we cannot come before you and present any facts." [Ibid., p. 54.]

Without reviewing further the arguments presented by the several counsel for the reopening of the case and the taking of additional testimony, it is sufficient to state that the reasons given for a rehearing of the original case were not convincing, and the Commission does not deem it to be necessary to reopen the case.

Questions similar to those that were at issue in the case before this Commission have been raised in proceedings now before the State of New Jersey Board of Public Utility Commissioners, and have been embodied in a complaint filed, with the Interstate Commerce Commission—interstate fares similar to the intrastate fares fixed by the Pennsylvania Commission having been permitted by the Interstate Commerce Commission to become effective. Should the decision in the cases pending before the New Jersey

and Federal Commissions result in the establishment of fares for travel within New Jersey and for interstate travel different from the fares which this Commission fixed in its order of December 12, 1914, it may be desirable, in the interest of uniformity of interstate and intrastate fares, to give such further consideration to the intrastate Pennsylvania fares as the condition created by the orders of the New Jersey and Federal Commissions may warrant.

While holding that there is no necessity of reopening the case for taking of further testimony, the Commission is of the opinion that certain facts upon which emphasis was laid in the argument of counsel at the hearing of January 8, 1915, justify a modification of the order of December 12, 1914, to the extent of requiring the 100-trip commutation ticket to be sold valid for one year from the date of issue, instead of for a period of six months. The 100-trip individual commutation ticket sold by all the respondent companies and the similar 50-trip ticket sold by the Philadelphia and Reading Railway Company were largely used; and, while the Commission did not think it necessary that the carriers should sell both the 100-trip and 50-trip tickets, it ordered the carriers to continue to sell a 100-trip individual commutation ticket, because the withdrawal of that ticket from sale "would unreasonably increase the fares paid by persons who have found those tickets suited to their needs." This ticket has been sold valid for a period of one year; but by the Commission's order of December 12, 1914, the period of validity was reduced to six months. It was thought that a 100-trip ticket valid for six months would be suited to the needs of commuters who travel between suburbs and the city frequently, but who can not economically use a monthly ticket. The needs of such commuters, it appears, are not met by a 100-trip ticket limited to six months; and in order that the 100-trip individual commutation ticket may more fully meet the requirements of those desiring to use it, the period of the validity of this ticket will be made twelve months from the date of issue.

The second prayer in the petition of the United Business Men's Association and the Commuters' Association is, as stated in the brief of counsel, "that a modification of that order (of December 12, 1914), be made establishing a zone limit of not more than

seven miles from the termini, for the use of any mileage rates, and that the old system of adding so much per station to points further distant in the compilation of new schedules."

This is, in effect, a petition for an order by the Commission requiring the respondent carriers to establish for the 100-trip ticket a schedule of per station fares. The Commission is requested to fix, instead of one maximum mileage rate within which the charges for 100-trip tickets shall be kept, a series of fare maxima, the rate per mile as well as the absolute charge changing with successive stations. Prior to the 15th of December, 1914, the charge for the 100-trip ticket was not upon a strict mileage basis. The tickets to stations successively more distant from the city terminal were sold at an irregularly declining rate per mile. This is the method now followed in fixing the charges for monthly tickets.

It is within the discretionary power of the carriers to maintain a schedule of reasonable fares changing with stations, instead of being based upon mileage. Such a schedule of charges would be a modified zone system of fares, and the Act of July 26, 1913, provides in Article III, Section 9, par. (a), (the short and long haul paragraph),

"That nothing in this section contained shall prohibit common carriers from establishing reasonable zone systems of charges."

The prayer of the petitioner raises the question of the power of the Commission to require the respondent railroad companies to adopt a system of fares or charges which establish for a particular ticket, mileage rates that change with successive stations. By Article V, Section 3, of the Public Service Company Law, the Commission is given the power, after hearing had upon its own motion or upon complaint to

"Determine, and prescribe by a specific order, the maximum just, due, equal and reasonable rates, fares, tolls and charges to be thereafter established, demanded, exacted, charged or collected for the service to be performed; and the just, due, equal, reasonable, and proper regulations and practices, as affecting such rates, to be observed by the public service company; and the Commission may classify such rates."

The Commission clearly has the power to prescribe a reasonable maximum fare; and, having power to classify rates, the Commission can presumably prescribe different maximum fares for different classes or kinds of passenger service; but the power to prescribe for any particular ticket, such as the 100-trip ticket in question, a schedule of charges worked out upon a "per station" system, is not specifically granted by the statute. The Commission cannot prescribe a schedule of absolute fares to be charged at successive stations. If the Commission goes farther than to fix a single maximum rate per mile within which the charges for a particular ticket shall be sold, it must establish a series of maxima varying either per station (as suggested by the petitioner), or by some scheme of fare zones. The Commission does not now hold that it has not the power to prescribe such a detailed system of fares; but it deems it inadvisable in the present case to raise the legal question that may be raised consequent upon an order modifying its finding and order of December 12, 1914, to the extent of substituting for the maximum mileage charge for the 100-trip ticket a schedule of per station or zone fare maxima.

The Commission is, however, of the opinion that the carriers might wisely charge less than the prescribed maximum fare of  $1\frac{1}{2}$  cents per mile for the 100-trip ticket to and from stations more than eight or ten miles from the city terminal. The maximum of  $1\frac{1}{2}$  cents per mile for the 100-trip ticket was fixed by the Commission, as was stated in its opinion issued subsequent to its finding and order, because it was thought by the Commission "that fares paid by those who ride upon 100-trip tickets might justly be midway between the fares paid by daily commuters, and the charges paid by those who use 10-trip tickets." The attention of the respondent carriers is called to the fact that the exaction of the full maximum of  $1\frac{1}{2}$  cents per mile for all distances results in charging those living more than ten miles from the city terminal; a fare for the 100-trip tickets in excess of the medium between 2 cents per mile (the charge for 10-trip tickets), and the rates at which the monthly tickets are sold.

This may be illustrated by reference to Bryn Mawr, Paoli, and West Chester. A charge of  $1\frac{1}{2}$  cents per mile for 100-trip ticket to Bryn Mawr, which is 10.3 miles from Broad Street Station, is

practically midway between 2 cents per mile and the mileage charge of 9.7 mills, which is the rate at which the monthly ticket is sold. On the contrary, at Paoli, 20 miles from Broad Street Station, the fare midway between 2 cents and the mileage charge of 7.5 mills, which is made for the monthly ticket, would be  $1\frac{3}{8}$  cents per mile instead of  $1\frac{1}{2}$  cents; and at West Chester, 27 $\frac{1}{2}$  miles from Broad Street Station, the mean between 2 cents and 7 mills, which is the mileage charge for the monthly ticket, would be 1.35 cents instead of  $1\frac{1}{2}$  cents. A charge of 1.35 cents per mile for the 100-trip ticket would reduce the cost of that ticket to and from West Chester, from \$41.25 to \$37.12. In charging the full maximum rate of  $1\frac{1}{2}$  cents per mile for all suburban stations to and from which the 100-trip ticket is sold, the carriers have observed the letter rather than the spirit of the Commission's order of December 12, 1914. It is the opinion of the Commission that the suburban traffic of the carriers might be appreciably increased by the adoption, for the 100-trip ticket, of a schedule of tapering fares which become less per mile with increasing distances from the city terminal.

The third prayer in the petition of the United Business Men's Association and Commuters' Association was that the "family ticket be restored upon all railroads, and that the use of this family privilege be extended to the 100-trip ticket," and in support of this prayer, counsel argued that, until a few years since, the respondent companies sold 100-trip and 50-trip tickets good for bearer and those accompanying him; and that, although during recent years these two tickets could be used only by the purchaser, a 50-trip family ticket, as well as a similar firm ticket, was sold by the Pennsylvania Railroad Company. Counsel also called attention to the fact that the Philadelphia and Reading Railway Company had sold a 26-trip ticket, good for bearer, to and from some suburban stations. Emphasis was also laid upon the practice of the Pennsylvania Railroad Company for selling a 50-trip family ticket between New York City and suburban points in New Jersey.

Inasmuch as the 100-trip commutation ticket sold by the Pennsylvania Railroad Company, and the 100-trip and 50-trip commutation tickets sold by the Philadelphia and Reading Railway Com-



pany prior to the 15th of December, 1914, were individual tickets, an order now issued changing the 100-trip ticket from an individual to a family ticket would have the effect of ordering the carrier to sell a different kind of a ticket than they had been selling prior to the date of the Commission's order of December 12, 1914. It is the opinion of the Commission that such an order as this ought not to be issued without reopening the original case for the introduction of additional testimony.

In connection with the motion to change the 100-trip ticket from an individual to a family ticket, the following considerations should be given weight. Certain purchasers of commutation tickets would be benefited by changing the 100-trip ticket from an individual to a family ticket, and they would thus secure a privilege which they did not possess prior to the 15th of December, 1914. Patrons of the Pennsylvania Railroad Company before that date could purchase a 50-trip family ticket or a 50-trip firm ticket, but such tickets of which only six were issued in the Philadelphia District during the twelve months ending with October, 1914,—were sold on a basis of two cents per mile, which is the rate that has been established by the Commission for the 10-trip ticket. There seems no reason for a 50-trip and a 10-trip ticket sold at the same mileage rate.

The 26-trip ticket, good for bearer, that was sold by the Philadelphia and Reading Railway Company prior to December 15, 1914, was sold to 29 of the 90 suburban stations within that company's Philadelphia commutation district. The rate at which this ticket was sold averaged from two cents to 1½ cents, or somewhat less per mile. The rate charged for the 26-trip ticket was thus appreciably higher than the mileage charge for the 50-trip individual ticket. The Commission's order of December 12, 1914, did not restore the 26-trip ticket, good for bearer, and the 50-trip individual ticket that had been sold by the Philadelphia and Reading Railway Company, because those tickets were not sold by other respondent carriers. It was the opinion of the Commission that the "same classes of tickets for suburban traffic ought to be sold upon all suburban lines out of a large city." Purchasers of the Philadelphia and Reading Railway Company's 26-trip tickets had the use of an especially favorable ticket, but it

is believed that their equitable demands are met by the sale of a 100-trip individual ticket, valid for a year, sold at a rate within the maximum fixed by the Commission, and by a 10-trip ticket, good for bearer, and sold at not to exceed 2 cents per mile.

The weight to be given comparisons between commutation fares in the Philadelphia and New York suburban districts must depend upon similarity of conditions as regards expenses of service, volume and concentration of traffic, and other factors affecting the reasonableness of charges. These factors are not analyzed in the record in this case. The 50-trip family ticket, good for a year, sold by the Pennsylvania Railroad Company for use between New York City and suburban points, is sold at the rate of 1.38 cents per mile between New York and Newark, where the competition with the trolley lines forces a low rate; but for stations beyond Newark the charge per mile ranges from 1.52 cents to 1.65 cents,—the charge being higher than the maximum which this Commission has fixed for 100-trip individual commutation tickets in the Philadelphia District,

The petition of the United Commuters' Association of Bryn Athyn, Huntingdon Valley, Valley Falls, Walnut Hill, Paper Mills, Woodmont, Philmont, Bethayres, and Meadowbrook requests the Commission to restore the "26-trip tickets and to reduce the fare charged for single-trips and return trips to the rate in force prior to December 15, 1914." For reasons stated in this opinion, it does not appear to the Commission that the 26-trip ticket need be restored. There has been no change in the charge for one-way tickets, and while the cost of the round-trip ticket, in some instances, has been substantially raised by making the price for it double the one-way fare, the Commission is not disposed to change the opinion it expressed in its report upon the original case, that the increase in fares resulting from charging for a round-trip ticket twice the one-way fare seems to be reasonable.

It is the judgment of the Commission, however, as to suburban traffic to which this opinion applies, and as regards the carriers which are respondents in this case, that tickets good in either direction between designated stations would be more convenient

for the traveling public and would impose no burden on the carrier.

An order directing the said respondents to substitute for the round-trip tickets and the one-way tickets now sold, in said traffic, tickets good in either direction between designated stations, will accordingly issue.

#### ORDER.

This matter being before the Commission on petitions of the Combined Committee of the United Business Men's Association of Philadelphia, et al., for a re-hearing and modification of the finding, determination and order heretofore made and issued, and having been duly heard and submitted by the parties, and the Commission having made and filed a supplemental opinion, which said opinion is hereby referred to and made a part hereof :

*Now, to-wit, May 20, 1915, It is ordered:* That the said petitions for re-hearing be, and the same are hereby refused; that the finding, determination and order of the Commission made and entered on December 12, 1914, in this complaint, be and the same is hereby modified as follows :

Paragraph 1, Section IV, which reads :—

"1. For the sale of one hundred trip individual commutation tickets valid for a period of six months from the date of issue, the rate charged for these tickets not to exceed one and one-half cents a mile,"

shall be changed to read :

"1. For the sale of one hundred trip individual commutation tickets valid, for a period of twelve months from the date of issue, the rate charged for these tickets not to exceed one and one-half cents a mile."

The said respondent carriers will, as to the suburban traffic to which this opinion applies, substitute for the round-trip tickets and one-way tickets now sold, tickets good in either direction between designated stations.

In all other respects said finding, determination and order be and the same is hereby affirmed.

By the Commission :

SAMUEL W. PENNYPACKER, *Chairman.*

IN RE APPLICATION FOR A HEARING OF COMPLAINTS DATED DE-  
CEMBER 14, 1914.

COMPLAINT DOCKET No. 315.

MAGEE, COMMISSIONER :

This is a petition for a further hearing in the Philadelphia Commuters' Case. The application must be denied in the form presented to the Commission.

On November 30th, 1914, the original complaint was filed; on December 10th and 11th, 1914, the complainants and respondents were accorded a hearing; on December 12th, 1914, The Public Service Commission issued an opinion and order in the premises [See ante pp. 262 and 390]. On December 14th, 1914, and upon the same subject matter that had rehearing; on the same day, the same complainants filed new complaints which they call "protests," alleging the same matter as that contained in the petition for rehearing, both being based upon the opinion and order of the Commission of December 12th, the same not having yet become effectual and not to become effectual until December 15th, 1914.

On January 8th, 1915, an argument for a rehearing and for modification of the prior Order of the Commission was had; on May 20th, 1915, the Commission rendered its decision upon the petition for rehearing and modification [See opinion and order immediately preceding]. Now, Counsel for the complainants asks for a third hearing, the same being based upon the complaints or protests filed at the same time as his petition for a rehearing, namely December 14th, 1914, and upon the same subject matter that had already been twice considered. No cause is shown for further hearings. The next step in the progress of complainants' cause, in law and in logic, if they desire to carry it farther, is an appeal to the proper court. The Public Service Company Law is explicit as to procedure with reference to rehearings and appeals, and common sense too, suggests that the jurisdiction of inferior tribunals must end some time. The power of the Commission is clearly exhausted under the pleadings as they appear on the record. True, the Commission may reopen

the case now or at any other time, but it must be upon cause shown, and true it is also, that the Commission may of its own motion institute an investigation de novo. But the subject is not presented in that aspect, and having in mind the admonition of the Commission to the respondents in its last deliverance upon the subject, viz: On May 20th, 1915, and that a reasonable time should be allowed the carriers to consider what was there said by the Commission; this and other prudential considerations not now necessary to enumerate, restrain the Commission from immediate consideration of the subject of its own motion.

ORDER.

The application having been duly presented and considered and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

Now, June 16th, 1915, it is ordered, That the petition dated May 26th, 1915, for a rehearing upon two complaints dated December 14th, 1914, be and the same is hereby dismissed.

W. B. D. AINEY, *Acting Chairman.*

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TOWN COUNCIL OF BIGLERVILLE BOROUGH v. BIGLERVILLE WATER Co.

COMPLAINT DOCKET No. 325.

ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and the complainant and respondent having made and filed of record, on the date hereof, an agreement and stipulation wherein said respondent company agreed that said additions and improvements in the facilities hereinafter mentioned were reasonable:

Now, to-wit, March 4, 1915, *It is ordered:* That the respondent, the Biglerville Water Company, shall on or before June 1, 1915, or within such additional time as in the judgment of the Commission may be necessary for the purpose, complete the ditch

now being excavated for piping by gravity the water from certain wells into the present reservoir of the said company; and shall also, on or before September 1, 1915, or within such additional time as in the judgment of the Commission may be necessary for the purpose, construct an additional reservoir with a capacity of at least one million gallons.

By the Commission :

SAMUEL W. PENNYPACKER, *Chairman*.

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IN RE ABOLITION OF GRADE CROSSING OF D. L. & W. R. R. OVER  
SIBLEY ROAD IN THE BOROUGH OF OLD FORGE.

*Assessment of Damages for injury to adjacent property.*

Subsequent to the issue of a Certificate of Public Convenience approving the abolition of a grade crossing of the tracks of the Delaware, Lackawanna & Western Railroad Co. over Sibley Road in the Borough of Old Forge, the company was unable to agree with the property owners in regard to the damages sustained by the adjacent property.

The Commission, after investigation, dismissed all claims except one and filed the following report.

APPLICATION DOCKET No. 296, 1914.

Report and Order of the Commission.

COMMISSIONER GAITHER :

The Commission, on November 17, 1914, issued a Certificate of Public Convenience, evidencing its approval of the abolition of a crossing at grade in the Borough of Old Forge, Lackawanna County, at a point where the Sibley Road crosses the tracks of the Delaware, Lackawanna and Western Railroad Company. At the hearing held on November 4, 1914, the petitioner, to-wit, the Delaware, Lackawanna and Western Railroad Company, by its attorney, advised the Commission that agreements would be entered into between the railroad company and adjacent property owners who might be affected by the proposed abolition. It appears that subsequent to the issuance of the Certificate of Public Convenience the railroad company has been unable to agree with the adjacent property owners, who claim to be damaged by reason

of the said abolition and the vacation of a portion of the Sibley road incident to said abolition. The only question, therefore, before the Commission is the determination of the amount of damages due to the adjacent property owners.

After a careful examination and consideration of the testimony in this case, the Commission is of the opinion that the claims of the property owners northwest of the improvement, or those holding real estate in the immediate section, with one exception to be referred to later, are not sustained and the said property owners are, therefore, not entitled to any damages in this proceeding. But one witness appeared in their behalf and he did not satisfactorily qualify as an expert on realty valuations, giving simply a hypothetical estimate of values with the conjecture that there would be a general depreciation of ten per cent., on the property, without apparent consideration of the distances from the improvement.

John A. Wood is the owner of a lot containing 24,120 square feet, having a frontage of 156 feet along Main street and 108 feet along Sibley road. The latter thoroughfare is to be vacated, said vacation extending the entire length of the Wood property. Upon this tract of land is a dwelling and barn, also a small frame building on the northeastern corner used by said Wood as a drug store. In its consideration of the amount of damages John A. Wood will sustain by reason of the abolition of the aforesaid crossing and the abolition of the portion of Sibley road occasioned thereby, the Commission has given full weight to all the evidence presented covering all the elements of damage which the attorney for the said claimant asks to be considered, to-wit, the destruction in the value of the land as a corner business site, loss in the traffic passing the property, and loss in the business of the claimant.

The Commission, therefore, finds and determines that the Delaware, Lackawanna and Western Railroad Company shall pay to John A. Wood, of the Borough of Old Forge, Lackawanna County, the sum of one thousand two hundred and twenty-five dollars (\$1,225.00) as compensation due to him by reason of property taken, injured or destroyed in the abolition of the aforesaid cross-

ing and vacation of Sibley road, and an order will be issued accordingly.

**ORDER.**

This matter being before the Commission on the question of the assessment of damages due to adjacent property owners by reason of the parties in interest being unable to agree as to the amount of said damages, and having been duly heard and submitted by the parties and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

*Now, to-wit, May 7, 1915, It is ordered:* That the Delaware, Lackawanna and Western Railroad Company shall pay to John A. Wood the amount ascertained and determined by the Commission (to-wit, the sum of \$1,225.00), or such amount as may be determined by the proper authorities on appeal; as damages for property taken, injured or destroyed by reason of the abolition of the said grade crossing in the Borough of Old Forge and the vacation of a portion of Sibley Road.

By the Commission:

SAMUEL W. PENNYPACKER, *Chairman.*

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H. H. RHOADES *v.* PENNSYLVANIA Co.

*Station facilities.*

COMPLAINT DOCKET No. 375.

COMMISSIONER PENNYPACKER:

A hearing having been held in the above matter May 6, 1915, at which the complainant having been notified, was not present and it appearing that the Village of Espyville has but thirty or forty inhabitants, that the village is about one mile from the railroad station, that there are now three trains in each direction which stop daily at this station one of which has been established since the complaint was filed, the Commission is of the opinion that the service is reasonably sufficient, and that the complaint ought to be dismissed.



**MARCELLUS R. LARE v. PENNSYLVANIA WATER CO.***Water meters—Rules and regulations of company.*

The respondent company offered to supply for \$9.00 a water meter for complainant's use in place of an old meter which was worn out. Complainant elected to furnish a meter and offered for installation one which read in gallons instead of cubic feet. The company refused to install it.

*Held:* As the refusal of the company was in accordance with its rules and regulations published and on file with the Commission, the complaint should be dismissed.

**COMPLAINT DOCKET No. 299.****Report and Order of the Commission.****COMMISSIONER TONE:**

The original meter, installed by the customer December 4, 1897, was removed by the company June 4, 1914, for the purpose of testing, and that same was found worn and out of repair.

The customer was advised the meter could be so repaired as to do service for three or four years, or that a new meter could be installed by the company for a cost of \$12.00, less an allowance of \$3.00 for the old meter, a net cost to the customer of \$9.00. The customer elected to furnish his own meter; and sent first, a cast iron meter which was refused by the company; and second, a brass mounted meter with dial reading in 1,000 gallons, which company refused to install unless the dial be changed to read in 100 cubic feet.

As the customer took no further action, the company turned the water off October 26, 1914. The customer then paid the charges demanded on October 27, 1914, and water was turned on.

The customer did not follow the company's rules in furnishing the meter, and the company did not furnish the customer with the detailed advice it might have given, relative to the meters it would accept.

The company's rules and regulations have been approved by the court of Allegheny County, and in the matter under consideration, the company has clearly acted in accordance with its said rules and regulations which are on file with its tariffs with this Commission.

The Commission is therefore of the opinion that the complaint should be dismissed.

ORDER.

This case being at issue upon complaint and answer filed, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission, having on the date hereof, made a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

Now, to-wit, May 20, 1915, *It is ordered:* That the complaint in this case be and the same is hereby dismissed.

By the Commission:

SAMUEL W. PENNYPACKER, *Chairman.*

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COUNTY COURT OPINIONS.

COMMONWEALTH v. METROPOLITAN LIFE INSURANCE CO.

*Life insurance companies—Tax on gross premiums—Deduction of annual dividends—Annuities—Act of June 1, 1911, P. L. 607.*

A life insurance company is not liable for the tax on gross premiums on the full amount of the maximum premiums which it is entitled to collect from its policy holders. The amount of bonuses and dividends credited upon the premiums named in its policies must be deducted and the tax paid only on what is actually received in money, notes, credits or other substitute for money.

A life insurance company is not liable under the Act of June 1, 1911, P. L. 607, for a tax upon the consideration money received by it for the granting of its annuities.

See also *Com. v. Penn Mutual Life Ins. Co.*, ante p. 559.

Appeal from settlement of tax on gross premiums. C. P. Dauphin County. Nos. 90 and 91, Commonwealth Docket, 1913.

*Wm. M. Hargest*, Asst. Deputy Atty. Gen. for Commonwealth.

*Jas. A. Stranahan* and *Arthur G. Dickson*, for defendant.

McCARRELL, J., May 5, 1915.

The defendant is a corporation of the State of New York, doing the business of life insurance in Pennsylvania. It issues ordinary life policies, industrial policies and contracts for payment of annuities. It has appealed from two settlements for tax on gross premiums for the years 1911 and 1912. Trial by jury has been duly waived in pursuance of the Act of April 22, 1874. From the evidence submitted we find the following,

#### STATEMENT OF FACTS.

The defendant has capital stock of \$2,000,000. By its charter the dividends on its capital stock are limited to 7 per cent. per annum. The premiums upon the ordinary life policies are payable annually, semi-annually or quarterly, and the premiums upon the industrial policies, which are for smaller sums, are payable weekly. The policies are classified as participating and non-participating. In fixing its premium rates the company allows a margin of safety and the premiums named in the policies are generally higher than necessary to carry the risks. This leads to the accumulation of a surplus "arising out of excess or overpayment of premiums by the policy-holders in the early years of their policies." The company makes periodical allotments of accumulated surplus to the credit of policy-holders, calling the same bonuses when the policies are non-participating and dividends when the policies are participating.

In 1911 the company reported gross premiums from business done in the State, being the aggregate amount of premiums fixed in policies, .....	\$9,366,846.70
It allotted policy-holders in dividends and bonuses, .....	743,201.47
And received in money for premiums, .....	\$8,623,645.23
It also received as consideration for its annuity contracts in 1911, .....	3,865.72
In 1912 the company reported gross premiums from business done in the State, being the aggregate amount of premiums fixed in the policies, .....	\$9,935,504.82
It allotted policy-holders in dividends and bonuses, .....	683,152.54
And received in money for premiums, .....	\$9,252,352.28

The company has paid the 2 per cent. tax upon the money received by it for premiums in 1911 and 1912. It denies its liability for tax upon the allotment or allowance to policyholders in reduction of their premiums, and denies also its liability for tax upon the \$3,865.75, as consideration for its annuity contracts. These are the questions to be determined upon these appeals.

#### DISCUSSION.

The taxing statute is the Act of June 1, 1911, P. L. 607, which provides in section 16, page 616, as follows:

"Every insurance company or association of another state or foreign government authorized to do business in this Commonwealth shall make report to the insurance commissioner on or before March first of each year, under oath of its president or secretary, showing the entire amount of premiums of every character and description received from business transacted in the Commonwealth during the year or fraction of year ending with the thirty-first day of December preceding, whether said premiums were received in money or in the form of notes, credits or any other substitute for money."

The tax is imposed upon the entire amount of premiums of every character and description "received in money or in the form of notes, credits or any other substitute for money." The defendant company contends that the statute does not impose any tax upon the allowances and allotments to policyholders in reduction of their premiums. The tax is imposed only upon premiums received in money, notes, credits or other substitute for money. These allotments and allowances were not received by the company at all, because of excess premiums previously paid by policyholders the company relieved the policyholders from payment to the extent of such excess premiums so paid, with the result that the company did not receive this sum either in money, by note, credit or other substitute for money. These allotments and allowances do not appear to be covered by the language of the taxing statute, which must be strictly construed. We have just considered this subject at length in our opinion filed in the case of *Commonwealth v. Penn Mutual Life Insurance Company*, Nos. 31, 32, 33 and 144, Commonwealth Docket, 1913, [ante, p. 559], and

refer to the discussion and authorities cited therein in support of the conclusion we shall announce here. In addition to the authorities cited in our opinion just referred to, we may cite the case of *Mutual Benefit Life Insurance Company v. Harold*, 198 Fed. Repr. 202 (Affirmed in 201 Fed. Repr. 918), in which case Judge Cross thus discusses and decides the question raised here:

"It appears that what the company received in cash, and all that it so received where the dividend is applied in abatement of renewal premiums is the difference between the stipulated premium and the so-called dividend. In such cases the dividends are not sums paid to the policyholders and by him returned in cash. They are not income received. The policyholder has not paid the premium stipulated in his policy, but a premium reduced by his share of a fund as ascertained by the directors composed of excess premiums. This seems to be the view which has been uniformly taken by the courts in so far as their decisions have been brought to my attention."

We are of opinion that the allotments and allowances here deducted from the amount of premiums fixed in the policies is not money received by the company either in cash, by notes or credits, and that the same is not liable to taxation under our statute.

The only remaining question is the liability for tax upon the consideration paid the defendant company for its annuity contracts. A difference is recognized between the ordinary insurance contract and the granting of an annuity. In *Commonwealth v. Provident Bicycle Association*, 178 Pa. 636, insurance is thus defined:

"A contract whereby for a consideration one undertakes to compensate another if he shall suffer loss."

In *Commonwealth v. Equitable Association*, 137 Pa. 412, it is stated that:

"The general object or purpose of an insurance company is to afford indemnity or security against loss."

In 2 Ency. of Law & Procedure, page 459, it is stated that:

"An annuity in its strict sense is a yearly payment of a certain sum of money granted to another in fee or for life or for years and chargeable only on the person of the grantor."

In the case of an annuity created by contract a certain fixed sum is paid as a consideration for an annual sum to be paid to the grantee of the annuity. The simplest form of insurance is an agreement to pay a lump sum upon the death of the insured, the consideration of which is the payment by the insured of an annual sum, known as the premium.

Insurance as generally understood is an agreement to indemnify against loss in case property is damaged or destroyed by fire, or to pay a specified sum upon the death of the insured or upon his reaching a certain age. An annuity is generally understood as an agreement to pay a specified sum to the annuitant annually during life. The consideration for an insurance contract is generally spoken of as a premium, which is payable annually, semi-annually, monthly or weekly. The consideration for an annuity contract is not generally regarded as a premium and is usually covered by a single payment. The power to make insurance contracts and to grant annuities seem to be recognized as entirely distinct in the Pennsylvania statute providing for incorporation of insurance companies. Our Act of July 9, 1897, P. L. 239 (2 Purdon 1941) provides that, "Any ten or more persons, citizens of this Commonwealth, may associate \* \* \* and form an incorporation for any of the following purposes to wit:

First: To make insurance either upon the stock or mutual principle against fire, etc., etc.

Second: To make insurance either upon the stock or mutual principle upon the lives of individuals, and every insurance appertaining thereto or connected therewith, and to grant and purchase annuities."

The New York statute of March 24, 1868, creating the defendant company in section 3 (Exhibit No. 5, page 11) provides as follows, to-wit:

"The business of the company shall be to make insurance upon the lives of individuals, and every insurance appertaining thereto or connected therewith and to grant, purchase or dispose of annuities."

It is significant that neither the legislature of Pennsylvania or New York appears to have supposed that the power to make every insurance appertaining to or connected with the lives of

individuals, conferred authority also to grant or purchase annuities. This authority is expressly added in the statute of each state.

In *People v. Security Life Insurance and Annuity Co.*, 78 New York, 114, the court said:

"There are several annuitants of this company, persons to whom the company for gross sums paid agree to pay certain sums annually during life; and the referee held that these persons were entitled to recover the present value of their annuities computed upon the basis of the Northampton tables, with interest at six per cent. It is claimed on behalf of some of the appellants that in this there was an error. I can perceive none. These are not cases of insurance, and they are not to be governed by any of the rules applicable to life insurance. They are cases simply where for a gross sum paid the company became bound to pay certain sums annually during the life of the annuitants."

For these reasons in our opinion the Act of June 1, 1911, P. L. 607, under which the Commonwealth here claims, and which imposes tax only upon premiums received by every insurance company, does not impose the tax upon the consideration paid for the granting of annuities. We therefore have reached the following

#### CONCLUSIONS.

1. The defendant company is not liable for tax upon the bonuses and dividends credited upon the premiums named in its policies of insurance, but is liable only for what it actually received in money, notes, credits or other substitutes for money.

2. The defendant company under the Act of June 1, 1911, P. L. 607, is not liable to tax upon the consideration money received by it for the granting of its annuities.

3. The defendant company has fully paid the tax imposed by the Act of June 1, 1911, upon the gross premiums received by it during the years 1911 and 1912, and is not now indebted to the Commonwealth in either of the cases stated in the caption hereto.

4. We therefore direct that in Nos. 90 and 91, Commonwealth Docket, 1913, judgments be severally entered in favor of the defendant and against the Commonwealth unless exceptions be filed within the time limited by law.

The defendant company has submitted requests for findings of fact and conclusions of law, which are quite voluminous. We have not specifically answered them, believing that what is stated herein is a sufficient reply to these requests. If, however, specific answers are desired, they will be immediately made upon request therefor.

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W. C. SCHILDT *v.* VALLEY RAILWAYS.

*Service of process on corporation—Jurisdiction of courts.*

The location of part of the property of a corporation and the transaction of part of its corporate business in one county is sufficient to give the courts of that county jurisdiction of a suit against it, and service of summons made personally upon the president of the corporation temporarily within that jurisdiction, is valid.

Rule to set aside service of summons. C. P. Dauphin Co. No. 89, September Term, 1914.

C. H. *Bergner*, for defendant and rule.

A. H. *Hull*, contra.

McCARRELL, J., June 11, 1915:

It appears from the petition on which the pending rule was granted that the defendant has no office and transacts no corporate business in the County of Dauphin, but owns and operates a railway track extending from the western bank of the Susquehanna river over and across the People's Bridge to Walnut street in the City of Harrisburg, from which street it runs its cars down Second street in said city on the tracks of the Harrisburg Railways Company a distance of 750 feet. The office of the defendant company is at Lemoyne, Cumberland County, in which county the president and executive officers reside. The sheriff returns that he served the summons upon C. H. Bishop, the president of defendant, by handing him a true and attested copy and making known to him the contents thereof. The return does not state at what place this service was made, but the petition for the rule informs us that the service was made upon Mr. Bishop, as president, while he was temporarily in the City of Harrisburg, Penn-



sylvania. Thus it clearly appears that the service was made in the county in which the summons was issued and not elsewhere. It is well settled that a suit may be lawfully brought against a corporation in any "County where the corporate property is in whole or in part situated or where it transacts a substantial part of its business": *Bailey v. W. & N. B. R. R. Co.*, 174 Pa. 114; *Jensen v. Phila. Ry. Co.*, 201 Pa. 603; *Park Bros. & Co. v. Oil City Boiler Works*, 204 Pa. 453. The defendant company owns, for purpose of operation, and operates more than 4,500 feet of street passenger railway track in Dauphin County and thereby enables its patrons to reach and depart from Market Square in the City of Harrisburg. A large number of persons is carried daily over this track.

We are of opinion that property of the defendant company is situated in the County of Dauphin and that a valuable portion of its business is done within the limits of the county. This is sufficient to give our court jurisdiction in the pending action against the defendant company, provided the service of the summons has been legally made. The Act of July 9, 1911, P. L. 614, regulates the service of process and provides in the second section, clause A, that a writ of summons may be served upon a corporation "by handing a true and attested copy thereof to the president, secretary, treasurer, cashier, chief clerk or other executive officer personally." The sheriff's return indicates that he has complied with this statutory direction in making service of the summons in this case, and it appears from the record that this service was made upon defendant's president in this county. The rule to set aside the service of the summons is therefore discharged.

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CALVIN A. KRAMER, CHARLES P. NEFF AND W. H. SLOAT, RE-  
CEIVERS OF THE FARMERS' PRODUCE COMPANY *v.* WILLIAM  
LOOK.

*Subscription to stock—Liability of subscriber—Affidavit of de-  
fense.*

A subscriber to the capital stock of a corporation, whose subscription was obtained by fraud, is liable to contribute his share of the capital, upon the insolvency of the corporation, so far as may be required to satisfy

those creditors whose claims attached before he elected to disaffirm his contract.

That no certificate of stock was tendered to the subscriber to the capital stock of a corporation is no defense to an action on his subscription. His relation to the company as a stockholder was fixed when he subscribed for the stock and his subscription was accepted.

Motion for judgment for want of sufficient affidavit of defense.  
C. P. Dauphin Co. No. 767, January Term, 1915.

*Wm. H. Earnest and Geo. L. Reed*, for plaintiff.

*Wm. M. Hain and Wm M. Hargest*, for defendant.

KUNKEL, P. J., May 15, 1915:

The defendant puts his defense on the ground that the subscription to the stock of the plaintiff company was obtained by misrepresentations and fraud. What he calls misrepresentations appear rather to be promises, and although he alleges the promises were never kept, he fails to allege that he ever made any demand upon the company for their fulfillment. Whether the representations or promises which were made constituted fraud may well be doubted. *Clark & Marshall Priv. Corp.*, Vol. 2, Sec. 471 (d); *Guarantee Co. v. Mayer*, 141 Pa. 511. The alleged representations were made by the promoter of the company before it was incorporated, at a public sale of the stock for which the defendant subscribed. It may be open to question whether they were binding upon the company.

However, aside from these considerations, even if the defendant was induced to subscribe for the stock by misrepresentations, it is too late for him now to disaffirm his contract of subscription. Several years have elapsed since the subscription was made, during which it does not appear that he took any steps to rescind the contract, and the rights of creditors have intervened. The law touching his liability under these circumstances is clear. A shareholder whose contract of subscription is obtained by fraud is liable to contribute his share of the capital upon the insolvency of the company, so far as this may be required to satisfy those creditors whose claims attached before he elected to disaffirm his contract. *Morawetz Priv. Corp.*, Vol. 2, Sec. 839; *Thompson on Corp.*, Vol.

1, Sec. 737; *Dettra v. Kestner*, 147 Pa. 566; *Howard v. Turner*, 155 Pa. 349; *Van Dyke v. Baker*, 214 Pa. 168. The reason upon which the law is founded is thus stated in *Morawetz on Private Corporations*, Vol. 2, Sec. 839: "When a person subscribes to the capital stock of a corporation he must be held to contemplate and intend that the corporation shall incur debts and pledge its capital, including the liability of its members for unpaid capital, as security. Creditors who in good faith trust a corporation upon the faith of this security stand in the position of innocent purchasers for value to the extent of their equitable lien, and it would be most unjust to permit a shareholder to disaffirm his contract and refuse to pay his share of capital after it has thus been pledged with his knowledge and consent to innocent third parties. \* \* \* It has accordingly been settled that if a corporation is insolvent a shareholder whose contract of subscription was obtained by the fraud of the company's agent cannot diminish the security of the bona fide creditor by rescinding his contract to contribute the amount of capital subscribed by him."

The allegation that no certificate of stock was tendered the defendant is immaterial and cannot help his defense to this action. The certificate would have only been evidence of his membership in the company. His relation to the company as a member and stockholder was fixed when he subscribed for the stock and his subscription was accepted. *Keystone Wrapping Machine Co. v. Bromeier*, 42 Super. Ct. 384.

If the defendant desired to rescind his contract and had legal grounds for so doing, it was his duty to act promptly, before the rights of creditors attached and the company became insolvent. To permit him to rescind now would work an injustice to the company's creditors.

Wherefore we adjudge the affidavit of defense insufficient and direct judgment to be entered against the defendant and in favor of the plaintiffs in the sum of \$100, with interest from September 22, 1914, the amount to be liquidated by the prothonotary.

IN RE APPLICATION FOR INCORPORATION OF BENEFICIAL SOCIETY  
UMBERTO FIRST.

*First class charters—Ground for refusal—Withdrawal of signer  
—Confusion of name with unincorporated society.*

The privilege of incorporation and the requirements to obtain it are wholly statutory, and when the demands of the statute are met by the applicants they are entitled to a decree unless there be a legal ground for refusal.

A party signing a charter application assumes a liability with the other signatories for the costs and expenses of the application and cannot withdraw his name for reasons predicated upon a mere assertion of misinformation not alleged and shown to have been wrongfully conveyed by them.

A voluntary society, though unincorporated, has a right to object to the incorporation of an association by the same name, and the court must refuse incorporation under that name.

Exceptions to application for incorporation. C. P. Berks Co.  
No. 62, December Term, 1914.

*William Rick*, for exceptant.

*William J. Rourke*, for petitioners.

ENDLICH, P. J., April 24, 1915:

On Dec. 1, 1914, articles of association in this case were filed, signed by five persons, "all of whom" are therein described as being "citizens of Pennsylvania." The number of directors is fixed at 3, and among those named as such for the first year is one of the associators. The provision as to membership admits, according to details to be prescribed by by-law, white male persons from 18 years of age (see Act 24 June, 1897, P. L. 204) upwards of good health and character upon proposal and election at a regular meeting. The adoption of by-laws "not inconsistent with law and the provisions of this charter" regulating the suspension and expulsion of members is to be made at a meeting called for that purpose after incorporation. The purpose of the proposed corporation is stated in the language of and with express reference to Cl. ix, sec. 2, Act 15 July 1897, P. L. 283, amendatory of the General Incorporation Act of 1874, to be "The

maintenance of a society for beneficial or protective purposes to its members from funds collected therein," and the sources of such funds are given as voluntary donations, fixed monthly dues and assessments, and proper fines, to be appropriated to sick and death benefits, special donations, running expenses, acquisition of property and other incidentals. On Jan. 30, 1915, one of the signers, Pepe, petitioned for leave to withdraw his name on the grounds that he was misinformed as to the true object of the proposed society, and that he believed no good purpose would be served by its incorporation. On the same day, exceptions were filed by certain parties alleging that not all the associators are citizens of the United States,—that proper requisites for continuing in membership are not set forth,—that the application is instigated by persons to whom previously a similar charter had been refused,—that there is no necessity for the incorporation of this society,—that one of the associators having asked to withdraw his name there remains an insufficient number for incorporation,—and that one of those named as directors is not a citizen of the United States. Subsequently, on Apr. 3, 1915, an unincorporated society of the same name as that of the proposed corporation, doing business in Reading since 1909, excepted because of the identity of names. Concerning the matter of citizenship depositions have been taken and presented to the court.

The decision in *Volksfest Verein*, 200 Pa. 143, plainly teaches that the privilege of incorporation and the requirements to obtain it are wholly statutory; that this court can neither grant nor refuse it except upon legal grounds; that where the demands of the statute are met by the applicants they are entitled to a decree of incorporation; and that the existence of a necessity for the establishment of the proposed corporation is not a prerequisite, nor its absence a valid reason for refusing the application. Again, under *Oliver v. Bridge Co.*, 197 Pa. 344, it is not perceived how the circumstance that the application is instigated or promoted by others who may not be in a position to prefer it can operate decisively against the granting of it, so long as it is made in due form, by competent parties, and for a declared and lawful purpose, and so long as the intent to serve that purpose is not impeached by proof of a corrupt arrangement: see *Com. v.*

P. & C. Co., 229 Pa. 231. The contention that, in spite of all this, it is needful or permissible to search for outside influences prompting the formation of an association, with a conjectural possibility of a misuse of it under their domination, goes too far. After all, the incorporation, if decreed, is the incorporation of certain associators for certain definite objects. If the former are qualified and the latter lawful, it cannot be assumed that the corporation will be handed over to unlawful elements or purposes. If it is, the remedy is apparent. Nor, of course, can the court reject, as not a "good purpose," for incorporation, one for which the statute gives the right of incorporation. Neither does the fact that one of the directors named is not a citizen of the United States make this application obnoxious to anything decided In re Chinese Club, 1 Distr. R. 84; Beneficial Club, 10 Phila. 380; Mut. Benefit Ass'n, 15 Pa. C. C. Rep. 644; St. Ladislaus Ben. Ass'n, 19 id. 25; St. David's Church, 11 Distr. R. 549, or the letter or clear implication of the statute. Concerning the withdrawal of one of the associators, much of what was said In re Application for Incorporation of Shillington, Q. S. Berks Co., No. 931 Misc. Dock, 1907, and the authorities there cited, seem to be pertinent here. By joining with the other signatories, this party committed himself, not only to a certain attitude towards the court, but to certain relations towards his fellows, including a liability with them for costs and expenses. Whatever might be his claim to relief had he been misled by their active fraud or misrepresentations, that claim can hardly be predicated upon a mere assertion of misinformation not alleged and shown to have been wrongfully conveyed by them. The attempted withdrawal thus out of the way, the objection on the ground of a deficiency in the number of associators falls with it. When we come to the tests of membership, there is no such want of specification as characterized the application in Mut. Benef. Ass'n, 15 Pa. C. C. Rep. 644, and similar cases, or of adequate provision for acquisition and continuation of membership: see Moose Home Ass'n, 2 Berks Co. L. J. 141; Real Est. Board of Brokers, 3 id. 374. It has been held in a number of decisions, collated in Relief Soc'y, 19 Distr. R. 543, 545, to which may be added those just cited arising in this court, that the articles of association must provide for

the loss of membership at least in a general way so as to afford protection to members against arbitrary deprivation of their rights by the majority. The provision above referred to for the adoption of by-laws regulating the suspension and expulsion of members seems to meet this requirement.

Whilst what has been said disposes, in substance, of all but one of the exceptions interposed, that one is more serious. It is needless to discuss the familiar rule; see *Penn Hardw. Co. v. Penn Hardw. Co.*; 3 Berks Co. L. J. 6, 8, and cases there cited, that an application for incorporation will not be granted by a name identical with that belonging to a pre-existing corporation, or so similar to it as likely to deceive, cause confusion, etc. The society whose name is here sought to be duplicated is not incorporated, and does not clearly appear to come, or to be entitled to the legal status of such as come, under the Act 6 Apr. 1893, P. L. 7. Yet it can scarcely be questioned that even a purely voluntary association may have a claim to the exclusive use of the name which it has adopted and under which it has established and carries on a legitimate business. It has on the contrary been held, in *Rudolph v. So. Benef. League*, 7 N. Y. Suppl. 135, and *McGlynn v. Post*, 21 Abb. N. C. (N. Y.) 97, that members of a voluntary society incorporating themselves by its name, without its consent, will be forbidden by injunction to use that name,—and in *Aiello vs. Montecaloo*, (R. I.) 44 Atl. 931, that the appropriation by an incorporated society of the name of a subsisting voluntary one will be enjoined. If this is so, it must be competent for the voluntary society to object to the incorporation of an association by the same name and obligatory upon the court appealed to for a decree of incorporation to heed such objection. Manifestly it would be improper for a court to create a corporation by a name, of the use of which, it was at the time apprised, it would itself, on its equity side, have to forbid at the instance of the objectors. That seems to be the situation here, with the effect that a decree of incorporation as asked for cannot now be made. The name of a corporation being an essential of its corporate existence: *B. & L. Ass'n v. B. & L. Ass'n*, 159 Pa. 308, 311, there is of course no such thing as an incorporation without fixing the name. Whether in this particular, or in any other that has been adverted to, the

present application is amendable, is a question which does not arise and is not to be passed upon at this time. In order to afford the applicants an opportunity for taking such steps as may appear proper and advisable, no final order will now be made.

The application for incorporation is continued until further order.

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WHITE v. FIRST NATIONAL BANK OF PITTSBURGH.

*Breach of contract—Damages—Loss of stock—Right of Stockholder to sue for injury to the corporation.*

Plaintiff contracted to borrow \$50,000 from the defendant, and it was agreed between them that when a corporation, then in the contemplation of the plaintiff, should be formed, the note of the corporation, endorsed by the plaintiff, should be substituted for his personal note. This was done and an agreement entered into between the corporation and the defendant for the renewal of the note. In violation of this agreement, defendant demanded payment and threw the corporation into bankruptcy, and on sale of the property the proceeds were not sufficient to cover the liabilities.

On an action brought by the plaintiff to recover damages for the destruction of the value of the stock which he held in the corporation, it was

*Held:* The original contract between the plaintiff and the defendant ceased to exist when the note of the corporation was substituted for the plaintiff's individual note with the consent of all the parties. The contract, the breach of which is alleged, is between the corporation and the defendant, and an action for damages should be brought by the corporation. The plaintiff has no right of action because he has failed to show any injury in himself apart from the injury to the corporation.

Demurrer to plaintiff's statement. No. 1493, January Term, 1915. C. P. Allegheny County.

*Reed, Smith, Shaw & Beal* and *Chas. H. Sachs*, for plaintiff.

*McKee, Mitchell & Alter*, for defendant.

SWEARINGEN, J., March 12, 1915.

B. White brought this action of assumpsit against the First National Bank of Pittsburgh, a corporation organized under the laws of the United States, to recover damages for the breach of a contract. To the plaintiff's statement of demand the defendant



has filed a demurrer; and upon the disposition thereof all his material averments of fact are, of course, to be taken as true.

For a long time prior to February 10th, 1911, the plaintiff had been engaged in the furniture and carpet business in the City of Pittsburgh, North Side. Desiring to conduct a general department store, he erected an eight-story building upon his lot at the corner of Sandusky and Ohio Streets. He planned the organization of a corporation to be called the B. White Company, to which he intended to transfer his said lot, building and business, and the issue of preferred stock of this corporation in the sum of \$500,000, which was to be sold for the purpose of acquiring additional capital for said business. About February 1, 1911, the plaintiff applied to the defendant for a loan of \$25,000, and during the course of the negotiations, he informed it of his said plans, and of his having obtained subscriptions for part of the preferred stock, upon which some money had already been paid. The cashier, F. H. Richards, suggested that the best time to sell the preferred stock was after the corporation had been organized and the business was in full operation, and he proposed that the plaintiff borrow \$60,000, which should stand as a loan until at least six months after the store had been entirely completed and the business started. An opportunity would thus be given for the sale of said preferred stock. This period of six months was to begin at the opening of the store, which was to be not later than September, 1911. The plaintiff declined to make a loan of \$60,000, but it was finally agreed that he would borrow \$50,000, upon the terms, inter alia, that he would keep on deposit in said bank 20 per cent. of the loan, or of the amount to which it might be later reduced; that he would give his promissory note for the loan, which was to be renewed from time to time during said period; and that, when the corporation should be organized and had taken over the business, its note should be substituted for his and he would endorse the same.

Pursuant to said agreement, the plaintiff gave his note for \$50,000 to the defendant, dated February 10th, 1911, opened an account and kept on deposit 20 per cent. of the loan. The B. White Company was duly incorporated and organized, and the plaintiff transferred to it his said business and property, the same

having at that time a net value of more than \$518,000, for which he received common stock in that amount. When the note above mentioned fell due, on June 10, 1911, the note of the B. White Company was substituted therefor and the plaintiff endorsed it, and the deposits were continued as had been stipulated. The said department store was formally opened on September 14, 1911.

On October 5, 1911, Oscar L. Telling, the president of the defendant bank, gave notice that the payment of said note would be demanded at its maturity, to wit, October 10th, 1911, and said "if it was not then paid he would push the corporation to the wall." Thereafter, it was agreed that, if there should be paid \$10,000 on account of said note, at its maturity, and a new note given for \$40,000, upon which \$1,000 should be paid each week until the whole should be discharged, the defendant would not demand payment of the entire loan of \$50,000. At that time the B. White Company had on deposit with the defendant \$16,226.18. In consequence, the B. White Company continued its deposits with the defendant, was ready and willing to pay the sum of \$10,000 and give a demand note for the balance, which the plaintiff would have endorsed, and to pay \$1,000 each week thereafter; and both the plaintiff and the B. White Company, on October 10, 1911, offered to consummate the agreement last above recited. Nevertheless, the defendant refused to comply with the same, demanded payment of the entire loan, refused the plaintiff's offer to waive protest, but did protest the note and credited thereon the aforesaid deposit of \$16,288.18. Immediately afterwards the defendant inquired of creditors of the B. White Company as to its promptness in payment, and communicated the fact of the protest of said note. The defendant also threatened the B. White Company with legal process, and other creditors were frightened into doing the same thing, and the financial credit of the B. White Company, which was of the best character, was thereby destroyed, and it was forced into bankruptcy. The assets were sold, the good will of the business was destroyed, and there was not sufficient realized to pay the debts. The plaintiff averred that, prior to the protesting of said note, the assets of the B. White Company exceeded its liabilities more than \$400,000 and

that, if they had been converted in the usual course of business, such an amount would have been realized.

The trustee in bankruptcy of the B. White Company has filed its account, the assets have been distributed, and the trustee has been discharged. The trustee did not pursue any claim against the defendant on behalf of the B. White Company on account of the grievances aforesaid but has abandoned the same.

The plaintiff, "having shown that he has sustained loss and damage through the said unauthorized and illegal acts of the said defendant, in the sum of \$400,000 and upwards," brought this suit to recover the same. He did not aver that he had suffered any damage, except what resulted from the aforesaid destruction of the value of his stock, substantially all of it, in the B. White Company.

As before stated, the defendant filed a demurrer to the plaintiff's statement of demand. In the view we take of the case, it is not necessary to consider any of the assignments, except the first and fifth, which we regard as decisive. They are as follows:

"(1) The said statement of demand discloses no right of action in this plaintiff. Such right, if any, would be in the B. White Company.

"(5) The alleged breach of contract upon the part of the defendant does not appear to have been the proximate cause of the damage alleged to have been sustained."

The original contract between these parties may be briefly stated as follows:

B. White agreed to borrow from the defendant, and it agreed to lend him, \$50,000, upon his note, which should stand as a loan until six months after September, 1911; during this period, the note was to be renewed from time to time; he was to keep on deposit in the defendant bank 20 per cent. of the loan, or of the amount to which it might be reduced; when the B. White Company, a corporation then in contemplation of the parties, should be organized, its note was to be substituted for his, which was to be endorsed by him.

This was a contract, not only for the loan of money upon collateral during a specified period, but also for the substitution of a new contract and of another debtor later. It was likewise a

contract for the benefit of the B. White Company, when that corporation should come into existence. The plaintiff was its promoter. The contract was one which the corporation could have assumed, and the subsequent transactions are conclusive that this did occur. What the parties thereafter did, the plaintiff, the defendant and the B. White Company, distinctly shows that their interpretation was the same as we have indicated. The B. White Company was organized and the plaintiff transferred his property to it. When his note fell due, the B. White Company gave its note endorsed by him to the defendant, which was accepted, and deposited its money in place of his deposit, and this was also accepted. These transactions must be regarded as in the nature of a novation which arises, either when a new debtor is substituted for a former one, or when a new contract takes the place of a former one, with the consent of all parties. In either event, the prior obligation is extinguished.

After the consummation of this new agreement, on June 10th, 1911, what obligation under the original contract remained as between the plaintiff and the defendant? None whatever that we can perceive. The defendant could no longer have maintained an action upon the plaintiff's note, because that of the B. White Company had been substituted. The defendant could no longer have demanded a deposit from him, because the deposit of the B. White Company had taken its place. The plaintiff could no longer have demanded a renewal of his note, because the note of the B. White Company was the only one thereafter to be renewed. Clearly the new contract was substituted for the old one, the B. White Company took the plaintiff's place as the debtor, and all three parties consented. It follows that the original contract was extinguished and was merged into the one made June 10, 1911; and this was exactly what the plaintiff and the defendant had stipulated should occur. If, therefore, no obligation of the original contract remained, it is plain that no action whatever can be founded thereon. Hence we must look elsewhere for the basis of this suit.

What, then, were the respective positions of these parties, relative to this substituted contract? Undoubtedly the defendant and the B. White Company were the principals. They were the

sole parties between whom direct contractual obligations were thereby established. It is equally undoubted that the only relation in which the plaintiff stood was that of endorser upon the note of the B. White Company. He assumed no other responsibility. The defendant never could have pursued him except in that capacity. If this be true, what right of action has he, the endorser of the note, against the defendant for the latter's breach of its agreement to extend the loan? We know of none. Such an action might be maintained by the principal debtor but surely not by a mere endorser. It might be that, if the defendant sued him upon his endorsement, he could plead its violation of the agreement, whereby he became endorser, and his consequent release. Upon that proposition we express no opinion, because the question is not involved here. But there is no averment that he has been pursued; none that he ever has been or ever will be compelled to pay anything by reason of his endorsement.

Nor can we discover that the plaintiff's position was changed in any respect, by the new arrangement made in October, 1911. At that time, about October 5, 1911, it was agreed that the B. White Company would pay \$10,000 upon its note, would give its demand note for the balance of \$40,000, which the plaintiff would endorse, would pay \$1,000 per week thereafter upon the loan, and would maintain the said deposit. This was an agreement between the defendant and the B. White Company. They were the principals. The defendant was to be the endorser of the note of the B. White Company—nothing more. Clearly, the above stated modification of the agreement made no change in the respective contractual relations of the parties.

There is, therefore, no contract pleaded in the statement of demand, upon which this action of assumpsit can be maintained by the plaintiff against the defendant. The original was merged into the new one on June 10, 1911. To this, he was not a party principal. Neither was he to the modification thereof in October 1911. Hence he cannot base this action upon any of these agreements; and he has alleged no other.

But, when the acts of the defendant of which the plaintiff complains are considered, it is certain that the view we have taken is correct. All of them related to the B. White Company alone.

The defendant refused to continue the loan of the B. White Company, not that of the plaintiff; its note, not the plaintiff's, was wrongfully protested; its deposit, not the plaintiff's, was illegally appropriated; and the destruction of the credit and the sacrifice of the property of the B. White Company resulted. Every one of these wrongs was an injury to the B. White Company, for which it alone is entitled to sue and recover, if anybody can. If, then, the right of action is in it, how can the plaintiff also maintain an action for the same cause? If he can, the defendant will be compelled to pay twice for the same injury. There must be something wrong with a proposition which leads to such a result.

The plaintiff has attempted to evade this difficulty by averments, that the receiver in bankruptcy of the B. White Company has abandoned any claim, which it might have against the defendant, and that the receiver has been discharged. But the bankruptcy of that corporation did not work its dissolution: Collier on Bankruptcy, 72. There is no averment in the statement of demand that the B. White Company has been dissolved. It must, therefore, be regarded as still in existence, at least for the purpose of redressing any wrongs it has suffered. In any event, the plaintiff is but a stockholder of the B. White Company. As such he does not represent it and cannot sue for its demands, even though he owns substantially all of the stock, as he does.

But the plaintiff is not endeavoring in this action to recover on behalf of the B. White Company. He is seeking a personal judgment against the defendant. He has laid no damages, except those which resulted to him by reason of the destruction of the value of his stock in the B. White Company. How, then, can he succeed in this action? It was argued that the question of the measure of damages cannot be raised upon a demurrer. This is true as a general proposition. But the plaintiff has averred no injury to himself, except the indirect one above stated. These damages, as we have shown, he cannot recover because the right thereto is in the corporation, if in anybody. He cannot recover nominal damages, because, as we have shown, there was no contractual obligation binding the defendant to him, which was broken.

We have examined the cases cited by the plaintiff, including the two upon which he specially relies. These two are *Bank of Commerce v. Bright*, 77 Fed. Rep. 949, and *Ritchie v. McMullen*, 79 Fed. Rep. 522. We do not think that either of these cases is at variance with the conclusions reached. There can, of course, be no doubt that a stockholder can maintain an action, where the act of which complaint is made is not only a wrong against the corporation, but is also in violation of duties arising from contract, or otherwise, and owing to him directly. That principle, it seems to us, is all that these cases rule. But the difficulty with the plaintiff's case, is that he has failed to show any injury to himself apart from the injury to the corporation, in which he is a stockholder.

In view of all of the foregoing, we are of opinion that the plaintiff is not entitled to recover against the defendant upon the cause of action which he has set forth in his statement of demand.

And now, to wit, March 12th, 1915, after argument and upon consideration, the demurrer of the defendant is sustained, and judgment is hereby entered in favor of the defendant and against the plaintiff.

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SCHMITT, RECEIVER, *v.* POTTER TITLE & TRUST CO.

*Corporate funds—Misappropriation of by treasurer—Suit to recover from payee.*

The treasurer of a corporation, having mortgaged his property, paid various sums to the mortgagee on account of the debt by checks out of the funds of the corporation. Each check was drawn by the corporation with the mortgagor's signature as treasurer.

On action brought by the receiver of the corporation against the mortgagee to recover the amount of the corporate funds so paid, it was

*Held:* 1. Failure of the corporation to record its charter until after it went into the hands of a receiver is no defense.

2. Unless it be shown that the corporation had knowledge that its funds were being misused, the receiver is entitled to recover. Evidence of the confusion of the company's money and the personal account of the treasurer, is insufficient to take the case to a jury unless such knowledge be shown.

3. The fact that the directors had abandoned the conduct of the corporation to the treasurer, is no defense. The doctrine of "Abandonment"

applies where one has been misled by the negligence of corporate officers, but cannot apply to this case where the checks given bore positive proof on their face of a conversion of corporate funds.

On motions and reasons by defendant for a new trial, and for judgment non obstante verdicto. No. 1744, January Term, 1913. C. P. Allegheny County.

*A. H. Mercer* for plaintiff.

*Stone & Stone*, for defendant.

HAYMAKER, J., March 27, 1915.

At the conclusion of the trial we directed a verdict in favor of the plaintiff and at the same time refused defendant's point that "Under the pleadings and all the evidence the verdict must be for the plaintiff."

The action was brought to recover the aggregate amount of ten separate checks drawn on the Real Estate Savings & Trust Company, signed "Interstate Lumber Co. W. A. Coleman, Treasurer," to the order of the Potter Title & Trust Co., defendant, the first of which was given November 27, 1909, and the last on August 19, 1911, amounting in all to \$809.66, and that defendant received the proceeds thereof. The action is on the ground that those checks were given by W. A. Coleman, treasurer, of the plaintiff company, in payment of the personal indebtedness of Coleman to the defendant company and of that there is no doubt. The indebtedness of Coleman to the defendant arose in this way: Coleman and his wife executed two mortgages, dated respectively April 26, 1909, aggregating \$5,000.00, on the property of the wife, and the Potter Title & Trust Co. was the mortgagee. The plaintiff company was in no way interested in that transaction between Coleman and wife and the defendant. Of the ten checks eight contained a notation that they were given on account of W. A. Coleman mortgage, one was marked "a/c W. A. Coleman," and the other "balance on assessm't, for grading Clifton Blv'd, W. A. Coleman, property." It thus appears that Coleman and wife had borrowed \$5,000.00 from the defendant, and the defendant from time to time, accepted those checks of the Interstate Lumber Co., signed by W. A. Coleman as treasurer thereof,



in payment of the personal indebtedness of Coleman growing out of the mortgage transaction. During the period of time covered by those checks, the plaintiff company was not indebted to the defendant company, nor at any other time, in any sum whatever. At no time did defendant make any inquiry of the plaintiff company as to knowledge or consent on the part of plaintiff company of said appropriation of its funds by Coleman. The foregoing facts were admitted by the defendant, and they raised the presumption that Coleman was appropriating the funds of the plaintiff in payment of his personal debts, and cast the burden of inquiry on the defendant, before accepting the checks.

There are practically three grounds of defense:

(1) That the plaintiff cannot maintain the action because the plaintiff company failed to record its charter, in the recorder's office of this county, at any time prior to the issuing of said checks, or the appointment of the receiver for the plaintiff company. The admitted facts are that letters patent were issued by the governor on August 25, 1908, and on the same day enrolled in the Charter Book at Harrisburg. The charter was not recorded in the recorder's office of this county until November 15, 1912, about four months after the receiver was appointed for the plaintiff company. It likewise appears that about the time said charter was granted in 1908 an organization of the company took place, officers were duly elected, by-laws were adopted, certificates of stock were issued and the business of the corporation carried on as such corporation for about four years prior to the recording of said charter. It was at least a *de facto* corporation. Letters patent were issued to it, the members thereof effected an organization, or at least believed that they had, and there was an assumption and exercise of corporate powers as fully apparently as would have been the case had such charter been duly recorded. This is an action by a receiver of an apparent corporate organization to receive and collect all the property, funds or claims of the organization, to file an account and make distribution according to the rights and interests of all concerned, and we fail to see how the defendant can question the right of the receiver to maintain this action, on the sole ground that the charter was not recorded as provided by the Act of Assembly.

(2) The second ground of defense is that Coleman, while secretary and treasurer of the plaintiff company, and prior to and during the time covered by the checks in question, mingled his personal funds or money with the funds of the plaintiff company of which he was treasurer, to the knowledge of certain officials and members of the board of directors, and that that fact was a justification of his act in giving and the defendant's in receiving those checks. It appears that the first depository of the funds of the plaintiff company was the Land Trust Company where the account was opened in the name of W. A. Coleman, and in which the funds of the company, and those of Coleman were kept indiscriminately. We do not consider the practice of the company and Coleman at that time as at all material, as it was of a time prior to the giving of the checks in question. The second depository of the company was the Real Estate Savings & Trust Company, and was opened in the name of the Inter-State Lumber Company on July 23, 1909, and was continued until January 8, 1912. There is no evidence that any funds were transferred from the Land Trust Company to the Real Estate Savings & Trust Co. The account was opened by the company, with the Real Estate Savings & Trust Co., by the discount of two notes of the company aggregating about \$800.00. Coleman testified that after the account of the company was opened with the Real Estate Savings & Trust Co. he deposited in that account funds of his own, at various times from September 8, 1910, to September 12, 1911, amounting to about \$1,300.00, but it equally appears that seven of the checks in question, amounting to \$515.25, were given by Coleman to the defendant before Coleman deposited any of his own funds in that account, and there is no evidence in the case to show when he gave the three last checks in question what funds of his own, if any, were on deposit in that account. Assuming it to be true that Coleman made certain deposits of his own money in that account, we do not think that fact would be sufficient to carry the case to the jury for there is no evidence that the plaintiff company had any knowledge of the fact that Coleman was giving the checks of the plaintiff company to the defendant or any other persons in payment of his personal obligations. It is also contended by the defendant that the

plaintiff company, at the time the checks were given was largely indebted to Coleman on account of salary, and that that fact gave him the right to give the checks in question. We find nothing in the minutes to indicate any corporate action in relation to Coleman's salary as secretary and treasurer. The plaintiff contended that no salary was ever fixed or agreed upon, and that Coleman's compensation was on a basis of commission on sales. Coleman testified that at a meeting of the board of directors on May 13, 1909, his salary was fixed at \$3,000.00 a year, to begin two days later, and from the books of the corporation he showed wherein he had been credited from time to time on account of salary. There was also evidence of a report to the board of directors of the affairs of the company, in which was included Coleman's salary. If the question of Coleman's salary were material, as affecting his right to give the checks in question, we should have submitted that question to the jury, but we do not think it was, as we could not have said to the jury that Coleman's right to give the checks of the company depended in any way upon the question of the company's indebtedness to him, unless there was evidence in the case that showed knowledge on the part of the plaintiff company that Coleman had been giving the checks of the company in payment of his personal debts, and no such evidence appeared.

(3) The third ground of defense is that of abandonment; that is, that the stockholders and directors abandoned the management and control of the affairs of the corporation to Coleman as its treasurer, and that therefore the corporation is liable for any irregular action on the part of its treasurer. We do not think that the doctrine of abandonment applies to the peculiar facts of the case in hand. The scheme of incorporation, or the manner in which the corporation was to do business was largely of Coleman's own creation, and was experimental and novel in its character. The object of the corporation was to engage in the wholesale lumber business. Each stockholder was to be a retail lumber dealer, and the corporation was to buy lumber from wholesalers and then sell at cost to the stockholders. The expenses of running the corporation were to be paid by the stockholders. Coleman had been formerly connected with a similar

concern and was instrumental in launching the one in hand. "Owing to the peculiar features of this corporation," as is said in the by-laws, the experience of Coleman in formerly running a similar concern, the lack of knowledge on the part of the stockholders and members of the board of directors, it is true that Coleman was largely in control of the management. There were, however, various meetings of the board of directors, and Coleman gave any one that made inquiry as to the operations of the concern to understand that it was getting on "Swimmingly." The cases in which it has been held that the corporation is liable for the acts of certain officers, to whom the conduct of the business is abandoned, are generally those in which the corporation has derived some benefit or some one has been misled by the negligence of the corporate officers, but this is not such a case. There is no evidence that the corporation knew that Coleman was giving the checks of the company to the defendant. The defendant accepted the checks in question, which, on their face, bore positive proof that they were given by the treasurer of the company in payment of a personal debt owing by Coleman to it, and this too without the slightest investigation or inquiry as to the right of Coleman to convert the funds of the company to his personal use. The checks themselves were notice of a conversion of corporate funds, and the defendant took them at its peril. We attach no importance to the minutes of the company providing that the signature of Coleman as treasurer shall be a valid endorsement of all negotiable paper, as such a provision applied only to legitimate transactions of the company, and could not be authority for the conversion of corporate funds. The checks on their face raised the presumption of a conversion of the corporate funds, putting the defendant on inquiry, and we discover no evidence in the case that can be said to meet that presumption, and justify the submission of the case to the jury.

The motions for a new trial and judgment non obstante veredicto are overruled.

**WOELPPER v. WILKES-BARRE & HAZELTON R. R. Co.***Service of process on foreign corporation—Registration.*

Service of process upon a foreign corporation registered in Pennsylvania and having a designated agent in another county, is invalid when made in a county where it has no assets, officers, agents or directors.

Rule to set aside service of summons. C. P. No. 3, Philadelphia Co. Sept. T., 1914, No. 3127.

*Mason & Edmonds*, for plaintiffs.

*Russell Duane*, for defendants.

McMICHAEL, P. J., Feb. 16, 1915.

This was a petition to set aside service of summons and a rule granted thereon. The petition of the Wilkes-Barre & Hazleton Railroad Company sets forth:

"1. That the Wilkes-Barre & Hazleton Railroad Company is a corporation created by, and existing under, the laws of the state of New Jersey and duly registered as a foreign corporation in the state of Pennsylvania, its designated agent being C. J. Kirschner, of the city of Hazleton, county of Luzerne and state of Pennsylvania.

"2. That the only place of business of the said defendant company in the state of Pennsylvania is maintained in the city of Hazleton, county of Luzerne, in said state.

"3. That the defendant company has no assets of any nature, kind or description in the city or county of Philadelphia, in the state of Pennsylvania.

"4. That the defendant company does not maintain any office in the city or county of Philadelphia aforesaid, nor do any of its directors, officers or agents reside or maintain any office or place of business therein."

The plaintiffs, by their answer, admitted the averments in paragraph 1 of the petition, and demanded proof of the averments of paragraphs 2, 3 and 4.

In the depositions taken on behalf of the petitioners, Mr. Charles B. Houck testified as follows (page 19): "Q. Where

do you live? A. Hazleton, Pennsylvania. Q. What position do you hold in the defendant company? A. Vice-president and general manager. Q. Are you familiar with the pleadings and the petition to set aside the service of summons and the answer thereto in this suit? A. I am. Q. In what counties of this state does your company maintain offices or places of business? A. Hazleton, Pennsylvania. Q. Is there an office anywhere except in Luzerne county? A. There is not. Q. Has your company any assets in the city or county of Philadelphia? A. They have not. Q. Do you maintain any office in this county? A. We do not. Q. Do any of your directors, officers or agents reside or maintain offices or places of business here? A. They do not." There were no countervailing proofs.

This testimony, in our opinion, brings the case within the ruling of the Supreme Court in *Park Bros. & Co. v. Oil City Boiler Works*, 204 Pa. 453. In that case, Mr. Justice Mitchell, delivering the opinion of the court on Jan. 5, 1903, said: "At common law, a corporation could only be sued in the territorial jurisdiction where it had its legal domicile, and that was where it had its chief place of business. The general corporation act of this state requires the charter to set out 'the place or places where its business is to be transacted,' and this becomes the legal domicile of the corporation. Notwithstanding the learned and ingenious argument of the appellant, it is too firmly settled to admit of question that the common law rule as to suits against corporations is still the general rule in Pennsylvania, and any exceptions to it must rest on clear statutory authority."

In the course of that opinion, the Act of July 9, 1901, P. L. 614, was considered, and it was held that that act was a regulation of service only, and did not enlarge the jurisdiction of the courts. The same case (*Park Bros. & Co. v. Oil City Boiler Works*, 204 Pa. 453) is also authority for the practice of setting aside service on rule.

This court, in the case of *Ludlow v. Valley Coal & Stone Co.*, 13 D. R. 691, followed the ruling of *Park Bros. & Co. v. Oil City Boiler Works*, 204 Pa. 453. In *Ludlow v. Valley Coal & Stone Co.*, 13 D. R. 691, the Act of April 3, 1903, P. L. 139, §2, was

also considered, and it was held that that act does not extend the jurisdiction of the subject-matter.

In *McCullough v. Railway Mail Assn.*, 225 Pa. 118, Mr. Justice Mestrezat, delivering the opinion of the Supreme Court on May 25, 1909, said (page 123): "If a defendant wishes to attack the regularity or sufficiency of the service of the writ or question the jurisdiction of the court without submitting to the jurisdiction for the trial of the cause on its merits, he may do so by entering an appearance *de bene esse* for the specific purpose. This is not such an appearance as will authorize the court to take any steps affecting the merits of the cause. The appearance is for the single purpose of attacking the regularity of the proceeding and the authority of the court to exercise jurisdiction in the cause. The question thus raised is a preliminary one, and should be decided before any further steps are taken in the cause."

In the case at bar, the defendant's counsel entered a special appearance *de bene esse* for the sole purpose of touching the jurisdiction of the court.

For the reasons above stated, we are of opinion that the courts of Philadelphia County have no jurisdiction over the subject-matter of the present suit. If the courts of Pennsylvania have jurisdiction at all in the present controversy, we think that suit should be brought in Luzerne County, where, according to the depositions, the principal office of the defendant company is situated and some of its assets are located.

Rule absolute.





## **APPENDIX**

### **Contents—**

<b>How to Use this Appendix .....</b>	<b>iii</b>
<b>Abbreviations and List of Reports Digested ...</b>	<b>iv</b>
<b>INDEX TO THE PUBIC SERVICE COM- PANY LAW .....</b>	<b>v-xxii</b>
<b>PUBLIC SERVICE COMPANY LAW—AN- NOTATED (AS AMENDED IN 1915) ....</b>	<b>xxiii-clix</b>
<b>Public Service Commission Citations .....</b>	<b>clv</b>
<b>The Public Service Company Law Cited .....</b>	<b>clvi-clix</b>



## FOREWORD

This appendix is designed to furnish reference to the latest decisions involving the interpretation and application of laws regulating public service companies. The cases cited include all opinions reported from the courts of last resort in every State in the Union, from the Federal courts, from all the courts of Pennsylvania, subordinate as well as appellate, and from the Public Service Commission of Pennsylvania, during the period from July 1, 1914, to approximately July 1, 1915.

The notes from opinions of the Public Service Commission are cumulated from Jan. 1, 1914, to July 1, 1915.

## HOW TO USE THIS APPENDIX

This Appendix is a key to every step taken in the regulation of public service companies in Pennsylvania since July 26, 1913, when the Public Service Company Law was approved. By it you can readily reach any opinion, ruling, rule of practice or order, in which you are interested.

Look up, in the Index to the Law, the subject with which you are concerned, and find the articles and sections of the Act dealing with that subject. Refer to these and you will find in the text at the top of the page, the statute law on that subject, and, in the notes, reference to all rules of practice, administrative rulings, general orders, rules of service, and opinions of the Commission, which deal with that subject.

Let us suppose, for example, that you wish to secure the approval of a contract between a municipality and a public service company. Your first step is to consult the Index to the Law. Under any of the subjects, "Approval of," "Contracts," "Municipalities," or "Public Service Companies," you will find reference to Article III, Sec. 11, P. L. 1395. Now, turning to the law itself, guided by the Article and Section numbers, or by the Pamphlet Law paging at the top of the pages, you will find Article III, Section 11, of the act, which is the section which requires such contracts to be approved by the Commission. The notes which are printed thereunder will refer you to Rule 36, of the Rules of Practice, which will give you the requirements to be observed in

presenting a petition for such approval, together with form of notice to be published in local papers. You will also find notes taken from all the opinions (about 16 in number) of the Commission dealing with the approval of municipal contracts. And finally, you will find a cross reference to Article V, Section 18, which deals with approvals in general and which states the statutory conditions precedent to all approvals.

The tables which follow the act itself, under the titles "Public Service Commission Citations," and "Public Service Company Law Cited," will show you where any decision of the Commission has been cited in any later decision by the Commission or by the courts, and where any article and section of the act has been cited in any opinion.

The following is a list of the volumes, with abbreviations used, which have been examined in the preparation of the notes.

Atlantic Reporter (Atl.) Vols. 90, 91, 92.

Federal Reporter (Fed.) Vols. 212, 213, 214, 215, 216, 217, 218, 219, 220, 221.

New York Supplement (N. Y. Suppl.) Vols. 147, 148, 149, 150, 151.

Northeastern Reporter (N. E.) Vols. 105, 106, 107, 108.

Northwestern Reporter (N. W.) Vols. 147, 148, 149, 150, 151.

Pacific Reporter (Pac.) Vols. 141, 142, 143, 144, 145, 146, 147.

Pennsylvania Corporation Reporter (P. C. R.) Vol. 2.

Pennsylvania Public Service Commission Report (1 P. S. C. Rep.) First Annual Report.

Pennsylvania State Reports (Pa.) Vols. 244, 245, 246, 247, 248.

Pennsylvania Superior Court Reports (Pa. Super.) Vols. 55, 56, 57, 58.

Southeastern Reporter (S. E.) Vols. 82, 83, 84.

Southern Reporter (So.) Vols. 65, 66, 67.

Southwestern Reporter (S. W.) Vols. 167, 168, 169, 170, 171, 172, 173, 174, 175.

United States Supreme Court (U. S.) Vols. 234, 235, 236, 237.

The remaining cases of the Oct., 1914, Term, which will be reported in 238 U. S., are here cited as U. S. Adv. Ops. 1914.

Citations of opinions, rulings, orders, etc., of the Pennsylvania Public Service Commission are printed in bold faced type.

## INDEX TO THE PUBLIC SERVICE COMPANY LAW.

NOTE.—The first numbers after each subject refer to the articles, sections, etc., of the act. Numbers marked PL refer to Pamphlet Laws of 1913, the paging of which is followed in our reprint of the Law.

### ACCIDENTS

investigator of, duties IV, 8, PL 1398.

notice of II, x, PL 1386.

reports of, not open to public inspection II, x, PL 1386; IV, 8, PL 1399.

### ACCOUNTS. See also RECORDS.

companies subject to the Interstate Commerce Commission V, 15, PL 1413.

depreciation account to be kept II, i, PL 1380; V, 15, PL 1413.

examination of by Commission V, 24, PL 1418.

filing with the Commission II, h, PL 1380; V, 25, PL 1419.

form of II, i, PL 1380; V, 15, PL 1413.

operating and capital accts. to be kept separate II, i, PL 1380; V, 15, PL 1413.

proceeds of securities II, l, PL 1381; V, 22, PL 1418.

to be kept in the commonwealth II, j, PL 1380.

### ACTS

amended—Sec. 9, of act of June 19, 1911, P. L. 1053, VI, 53, PL 1435.

power to regulate routes of street railways under act of May 15, 1895, P. L. 65, V, 1, PL 1402.

Public Service Company Law takes effect Jan. 1, 1914, VI, 54, PL 1436.

reorganization of companies under act of April 8, 1861, P. L. 259, III, 6, b, PL 1392; V, 21, PL 1416.

repealed: VI, 51, PL 1434.

all acts inconsistent

1874, April 29, P. L. 73, part of Sec. 34, General corporation act.

1883, June 4, P. L. 72, Sections 1, 2, Forbidding discrimination by common carriers.

1907, May 24, P. L. 229, Regulating demurrage rates.

1907, May 31, P. L. 337, Railroad Commission Act.

### ACTION

existing rights of action preserved V, 29, PL 1415.

limitation upon order of reparation V, 5, PL 1405.

upon actions for penalties, etc., VI, 44, PL 1432.

recovery of damages for unjust charges, etc., V, 5, PL 1405.

finest from companies VI, 4, PL 1421.

penalties for the violation of orders VI, 35, PL 1430.

right of property owners V, 12, PL 1410.

suits under this act are cumulative VI, 42, PL 1432.

ADJUSTMENT OF CHARGES AUTOMATICALLY III, 1, a, PL 1387.

AGENT. See OFFICERS.

AMENDMENT OF CHARTER, III, 3, a, PL 1388.

ANSWER

in appeals to court VI, 21, PL 1427.

to petition before the Commission VI, 6, PL 1422.

APPEAL. See also PRACTICE.

from valuation made by the Commission V, 21, PL 1417.

none allowed on order of reparation VI, 17, PL 1425.

notices of VI, 18, PL 1425.

of property owner from award of the Commission V, 12, PL 1410, 11.

procedure in general VI, 17-32, PL 1424-9.

to court from order of the Commission VI, 17, PL 1424, 5.

when it shall be a supersedeas, VI, 19, PL 1426.

shall have precedence on calendar VI, 28, PL 1428.

to the Supreme Court VI, 30, PL 1428.

APPLICATION FOR

approval of incorporation, renewal of franchises, merger, crossings, connections, etc., V, 18, PL 1414, 5.

certificate of valuation III, 4, a, PL 1389.

hearing upon V, 21, PL 1416.

change of rates, II, f, PL 1379.

interlocutory order of supersedeas VI, 19, PL 1426.

rehearing VI, 14, PL 1424.

not a supersedeas VI, 15, PL 1424.

relief from carrying a depreciation account V, 15, PL 1413.

right to charge special rate for short distances III, 10, PL 1395.

APPROVAL OF—as to all approvals see V, 18, 19, PL 1414, 1415.

change in rates II, f, PL 1379.

construction, etc., of crossings III, 5, PL 1391; V, 12, PL 1408.

contracts with municipal corporations III, 11, PL 1395; (See VI, 54, PL 1436).

foreign corporations III, 3, b, PL 1388.

incorporation of new company III, 2, a, PL 1388.

lease, merger, etc., III, 3, c, PL 1388.

municipal corporation furnishing public service III, 3, d, PL 1388.

public benefit, approval given only for V, 18, PL 1415.

purchase of controlling interest III, 6, c, PL 1392.

removal of records from Pennsylvania II, j, PL 1380.

renewal of charter and franchises III, 3, a, PL 1388.

ARTIFICIAL GAS COMPANIES, are within the act I, PL 1375.

ASSOCIATIONS are "corporations" within the act I, PL 1375.

ATTORNEY GENERAL

general counsel for the Commission IV, 6, PL 1398; VI, 34, PL 1429.

to institute suit after investigations of Commission V, 14, PL 1412.

**BAGGAGE TRANSFER CORPORATIONS** are Public Service Companies I, PL 1375.

**BILL OF LADING**

duty of company to issue II, q, PL 1383.

liability of initial carrier II, q, PL 1383.

**BOND**

on order of supersedeas VI, 19, PL 1426.

secretary's bond IV, 5, PL 1398.

**BONDS.** See **SECURITIES.**

**BRIBERY** IV, 13, PL 1401.

**BRIDGE COMPANIES** are Public Service Companies I, PL 1375.

**BURDEN OF PROOF,** in

appeal to court VI, 23, PL 1427.

application for change of rate V, 4, 5, PL 1404, 5.

hearing upon the violation of an order VI, 9, PL 1423.

**CANAL CORPORATIONS** are within the Act I, PL 1375.

**CAPITAL STOCK.** See **SECURITIES.**

**CAPITALIZING FRANCHISES AND CONTRACTS** III, 6, a, PL 1392.

**CERTIFICATE OF**

Notification, are public records III, 4, d, PL 1390.

contents of III, 4, b, PL 1389.

filing of III, 4, b, c, PL 1389, 90.

penalty for false statement VI, 37, PL 1431.

verification III, 4, d, PL 1390.

when unnecessary III, 4, d, PL 1390.

payment, to be given shippers II, f, PL 1379; V, 4, PL 1404.

proceeds of sale of securities II, 1, PL 1381.

Public Convenience, in general V, 18, 19, PL 1414, 15.

prior to incorporation III, 2, PL 1388.

prior to location of crossings III, 5, PL 1391; V, 12, PL 1409.

securing certificates fraudulently VI, 38, PL 1431.

valuation, application for III, 4, a, PL 1389.

contents, effect of V, 21, PL 1417.

when unnecessary III, 4, d, PL 1390.

**CHARTER**

amendment of, renewal of, supplement of III, 3, a, PL 1388.

approval of, III, 2, a, PL 1388.

**CLASSIFICATION**

Commission may classify rates V, 3, PL 1404.

of Public Service Companies by the Commission V, 15, PL 1413.

of service and rates, allowed III, 1, b, PL 1387.

power of Commission to supervise V, 2, PL 1403.

**COMMISSION—CONSTITUTION OF—**IV, PL 1396-1402.

appropriation for IV, 11, PL 1400.

counsel for IV, 6, PL 1398.

employees IV, 9, PL 1399; IV, 12, PL 1400.  
 investigator of accidents IV, 8, PL 1398.  
 marshal IV, 7, PL 1398; VI, 13, PL 1424.  
 offices, meetings, etc. IV, 17-20, PL 1401-2.  
 organization of VI, 54, PL 1436.  
 power of one commissioner IV, 4, PL 1397.  
 qualifications, terms, etc. IV, 2, PL 1396; IV, 12, PL 1400.  
 quorum IV, 3, PL 1396.  
 removal of employees or commissioners IV, 14, 15, PL 1401.  
 salaries, etc., IV, 10, 11, PL 1399, 1400; VI, 54, PL 1436.  
 seal IV, 1, PL 1396.  
 secretary IV, 5, PL 1397.  
 vacancies IV, 3, PL 1396.

#### COMMISSION—DUTIES OF

to make written orders in all hearings VI, 10, 11, PL 1423; V, 19, PL 1415; V, 21, PL 1417.

to report annually to the Governor VI, 48, PL 1433.

#### COMMISSION—POWERS OF—V, PL 1402-1419.

accounts, control of V, 15, PL 1412, 3.

approvals by. See Approval of.

complaints to. See Complaint.

connections, to require between railway lines V, 7, PL 1406.

between telegraph lines V, 8, PL 1407.

between telephone lines V, 9, PL 1407.

crossings, to regulate construction of V, 12, PL 1408-12.

damages, to recover any paid to property owners V, 12, PL 1411.

facilities, to prescribe adequate V, 17, PL 1414.

fees collectible by Commission VI, 47, PL 1433.

general powers V, 27, 28, PL 1419; V, 1, PL 1402.

hearings, to hold V, 19, PL 1415.

to hold upon its own motion VI, 8, PL 1423.

improvements, to require making of V, 13, PL 1412.

inspection of property and records V, 23, PL 1418.

Interstate Commerce Commission, to petition V, 11, PL 1408.

obedience of companies, to compel VI, 33, PL 1429.

order, to compel complainant to defend appeal VI, 20, PL 1426.

rates, to regulate V, 3, 4, PL 1403, 4.

to apportion joint rates V, 10, PL 1408.

records, to inspect V, 23, PL 1418.

to require filing of V, 15, PL 1413.

rehearings, to hold VI, 12, PL 1423.

reparation, to make order of V, 5, PL 1405.

reports, to compel filing of V, 25, PL 1418.

reevaluation, to make V, 20, b, PL 1416.

routes of street railways, to supervise V, 17, PL 1414.

rules and regulations, to make V, 26, PL 1419.



securities, to investigate issues of V, 14, PL 1412.  
to compel accounting for V, 22, PL 1418.  
service, to prescribe the quality of V, 2, PL 1403.  
to set standard of V, 13, PL 1412.  
tariffs and schedules, to prescribe form of V, 16, PL 1413.  
to limit number of II, d, PL 1378.  
transfers, to regulate V, 6, PL 1406.  
valuation, of property V, 20, a, PL 1415.  
of franchises, etc. V, 21, PL 1416.  
to prescribe form of V, 20, c, PL 1416.  
witnesses, to compel attendance of V, 24, PL 1418.

**COMMON CARRIERS.** See also **RAILROADS—STREET RAILWAYS.**

bill of lading, liability on II, q, PL 1383.  
continuous passage, duty to provide II, p, s, PL 1383, 4.  
definition of I, PL 1376.  
distribution without discrimination II, n, PL 1382.  
general power of Commission over V, 17, PL 1414.  
facilities, must be adequate II, m, PL 1381.  
rates, on long and short hauls III, 9, a, PL 1394.  
power of Commission to regulate V, 3, 4, PL 1403, 4.  
schedules and tariffs, filing of II, d, PL 1378.  
service, power of Commission over V, 17, PL 1414.  
transfers, power of Commission over V, 1, PL 1402.

**COMMONWEALTH,** property of not subject to Commission I, PL 1377.

**COMPLAINT.** See also **PRACTICE.**

dismissal of VI, 10, PL 1423; VI, 7, PL 1422.  
party making, may be ordered to defend appeal VI, 20, PL 1426.  
right of Commission to act without VI, 8, PL 1423.  
right of company to make III, 1, d, PL 1387.  
right of any person to make VI, 6, PL 1422.

**CONNECTING COMPANIES**

continuous service to be provided by  
railroad companies II, s, PL 1384; V, 7, PL 1406.  
telegraph companies II, u, PL 1385; V, 8, PL 1407.  
telephone companies II, v, PL 1385; V, 9, PL 1407.  
joint tariffs to be filed II, e, PL 1378.  
time schedules of II, r, PL 1383; V, 6, PL 1406.

**CONNECTIONS.** See also **SWITCH CONNECTIONS.**

approval of Commission for V, 18, PL 1414.  
railroad lines II, s, 1384; V, 7, 1406.  
telegraph lines II, u, PL 1385; V, 8, PL 1407.  
telephone lines II, v, P. L. 1385; V, 9, PL 1407.

**CONSTITUTIONALITY,** provisions of the act are severable VI, 50,  
PL 1434.

**CONTEMPT OF COURT.** See **PRACTICE.**

**CONTRACTOR** for construction of crossings V, 12, PL 1411.

**CONTRACTS**

approval of contracts between municipalities and public service companies III, 11, PL 1395. (See VI, 54, PL 1436.)

for construction of crossings V, 12, PL 1411.

for exchange of service between companies III, 9, b, PL 1394.

filing of, with the Commission II, g, PL 1379.

**CONTROLLING RIGHTS**, purchase of III, 6, c, PL 1392; V, 18, PL 1414.

**CONVEYANCE OF PASSENGERS AND PROPERTY**, defined I, PL 1376.

**CORPORATIONS**, defined I, PL 1375.

**COSTS** of hearings VI, 2, PL 1421.

on appeal VI, 18, PL 1426; VI, 24, PL 1428.

**COURTS**. See also **APPEALS**, **PRACTICE**.

aid of for Commission VI, 3, 4, PL 1421.

appeal to VI, 17, PL 1424; V, 5, 1405.

Dauphin County, jurisdiction in injunctions VI, 31, PL 1429; in mandamus VI, 33, PL 1429; in suits for penalties VI, 35, PL 1430.

Superior Court, exclusive jurisdiction of appeals, VI, 17, PL 1424.

may grant special order of supersedeas VI, 19, PL 1426.

**CROSSINGS**

construction, alteration, etc. III, 5, PL 1391; V, 18, PL 1415.

duty of companies to obey orders regarding II, t, PL 1384.

regulation of, by Commission V, 1, PL 1403; V, 12, PL 1408.

relocation of V, 12, PL 1409; damages for V, 12, PL 1410.

safety appliances at II, t, PL 1384; V, 12, PL 1409.

**DAMAGES**

appeal from award of VI, 17, PL 1425.

civil liability of companies VI, 40, PL 1432.

crossings, for construction of V, 12, PL 1409.

rates, for excessive V, 5, PL 1405.

recovery, against common carrier II, q, PL 1383.

by Commonwealth V, 12, PL 1411.

**DEFINITIONS** I, PL 1375-7.

**DEMURRAGE CHARGES**, power to regulate V, 17, PL 1414.

**DINING CAR CORPORATIONS** are within the act I, PL 1375.

**DISCRIMINATION**

In general, forbidden III, 8, a, b, PL 1393.

against connecting carrier II, s, PL 1384.

against connecting telegraph company II, u, PL 1385.

against connecting telephone company II, v, PL 1385.

by allowing for service rendered III, 1, c, PL 1387.

by false billing, classification, etc. III, 9, b, PL 1394.

in distribution of cars, etc. II, n, PL 1382; V, 17, PL 1414.

in payments III, 1, c, PL 1387.

in rates III, 8, a, PL 1393.

hearing to determine V, 3, PL 1403.

reparation, order for V, 5, PL 1405.

short and long hauls III, 9, a, PL 1394.

short and long transmission of messages III, 10, PL 1394.

**DISTRIBUTION OF FACILITIES.** See **FACILITIES.**

**DIVIDENDS,** automatic change of rates to meet III, 1, a, PL 1387.

**ELECTRIC CORPORATIONS.** See **LIGHT, HEAT, AND POWER.**

**ENTRY,** right of, by Commission V, 23, PL 1418.

#### **EVIDENCE**

accidents, report of inadmissible II, x, PL 1386; IV, 8, PL 1399.

copies of Commission's records admissible VI, 46, PL 1433.

depositions VI, 5, PL 1422.

examiners to take testimony, appointment of IV, 4, PL 1397.

in appeals to court VI, 23, PL 1427; VI, 25, PL 1428.

in suit upon an order of reparation V, 5, PL 1405.

production of VI, 1, PL 1420.

**EXAMINERS** to take testimony, appointment of IV, 4, PL 1397.

**EXCHANGE OF SERVICE** between companies III, 9, b, PL 1394.

**EXEMPTION** of initial carrier from liability II, q, PL 1383.

**EXPRESS COMPANIES.** See **COMMON CARRIERS.**

#### **EXTENSIONS**

duty of company to make II, c, m, PL 1377, 1381.

power of Commission to compel V, 1, 13, PL 1402, 1412.

valuation of V, 20, b, PL 1416.

#### **FACILITIES**

adequacy, Commission is judge of V, 1, PL 1403.

hearing to determine V, 2, PL 1403.

crossing of, See **Crossings.**

definition of I, PL 1376.

distribution of V, 1, PL 1403; V, 17, PL 1414.

discrimination in, forbidden II, n, PL 1382.

filing schedule of II, d, PL 1378.

duty to furnish II, a, PL 1377; II, m, PL 1381.

make improvements in II, c, PL 1377.

standard of V, 13, PL 1412.

use of by another company II, s, PL 1384.

#### **FEES** for

copies of records, etc., of Commission VI, 47, PL 1433.

service of process on appeals VI, 27, PL 1428.

service of subpoena VI, 2, PL 1421.

witnesses VI, 2, PL 1420.

**FERRY CORPORATIONS.** See **COMMON CARRIERS.**

#### **FILING**

certificates of Notification III, 4, b, c, PL 1389, 90.

contracts II, g, PL 1379.

- joint tariffs II, c, PL 1378.
- rates, for excursion tickets, etc. III, 9, b, PL 1394.
- for service exchanged III, 9, b, PL 1394.
- notice of change of II, f, PL 1379.
- sliding scale of III, 1, a, PL 1386.
- records, maps, accounts, etc. V, 15, PL 1413.
- of foreign corporations II, j, PL 1381.
- reports II, h, PL 1380; V, 25, PL 1418.
- rules and regulations II, d, PL 1378.
- tariffs and schedules II, d, PL 1378; III, 7, PL 1393.
- effect of filing VI, 41, PL 1432.
- form of V, 16, PL 1413.
- written order to be filed after each hearing VI, 10, 11, PL 1423.
- FOREIGN COMMERCE**, act does not apply to VI, 49, PL 1434.
- FOREIGN CORPORATIONS**, right to operate III, 3, b, PL 1388.
- records of, to be furnished II, j, PL 1380.
- FRANCHISES**
- capitalization of III, 6, a, PL 1392.
- renewal of III, 3, a, PL 1388; V, 18, PL 1414.
- sale of III, 3, c, PL 1388.
- valuation of V, 21, PL 1416, 7.
- GAS CORPORATIONS**
- meter tester to be kept by II, w, PL 1385.
- courts no longer control. See ACTS, portions of act of 1874 repealed.
- quality of gas, Commission is judge of V, 1, PL 1403.
- GRAIN ELEVATOR CORPORATIONS** are within the act I, PL 1375.
- HEALTH DEPARTMENT**, powers of unaffected VI, 45, PL 1433.
- HEARING**
- In general V, 19, PL 1415.
- before court on special order of supersedeas VI, 19, PL 1426.
- costs of VI, 2, PL 1421.
- public, all hearings shall be VI, 1, PL 1420.
- written order to be filed after every VI, 10, 11, PL 1423.
- HEAT CORPORATIONS**. See LIGHT, HEAT, AND POWER.
- IMMUNITY** from prosecution VI, 1, PL 1420.
- IMPROVEMENTS**
- duty to make II, c, PL 1377; II, m, PL 1381.
- power of Commission over V, 1, PL 1402; V, 13, PL 1412; V, 17, PL 1414.
- right to enjoy profits of III, 1, a, PL 1387.
- INCLINE PLANE CORPORATIONS**. See also COMMON CARRIERS.
- transfers, etc. II, r, PL 1383; V, 6, PL 1406.
- INCORPORATION**, approval of Commission III, 2, PL 1388; V, 18, PL 1414.
- INFORMATION**, may be kept secret by Commission V, 26, PL 1419.

**INITIAL CARRIER**, liability of II, q, PL 1383.

**INJUNCTION**

to enforce order of Commission VI, 33, 34, PL 1429.

to stay order of Commission VI, 31, PL 1429.

effect of VI, 36, PL 1430.

**INSPECTION**, general power of Commission V, 23, PL 1418.

**INTERNAL AFFAIRS**, powers of Secretary unaffected VI, 45, PL 1432.

**INTERSTATE COMMERCE**, act does not apply to VI, 49, PL 1434

**INTERSTATE COMMERCE COMMISSION**

accounts, I. C. C. system to be followed V, 15, PL 1413.

facilities, I. C. C. rule to be followed II, n, PL 1382.

Public Service Commission may petition to V, 11, PL 1408.

reports made to I. C. C., copies to be filed with Public Service Commission V, 25, PL 1418.

schedules, I. C. C. form to be used II, d, PL 1378; V, 16, PL 1414.

**ISSUE OF STOCKS**, Etc. See **SECURITIES**.

**JOINT RATES**

power of Commission to apportion V, 10, PL 1408.

through telephone service V, 9, PL 1408; II, v, PL 1385.

regulation of by Commission V, 3, PL 1404; V, 7, PL 1406.

**JOINT TARIFFS AND SCHEDULES**, to be filed II, e, PL 1378.

"published rate" legal if none is filed II, e, PL 1379.

**JOINT STOCK COMPANIES** are "corporations" I, PL 1375.

**JURY TRIALS** VI, 17, PL 1425; VI, 29, PL 1428.

**LEASES**. See also **SALE**.

companies operating under, reports of II, i, PL 1380.

copies of, to be filed II, g, PL 1379.

power to make III, 3, c, PL 1388.

**LIABILITIES** in general II, PL 1377-86.

civil liability of companies VI, 40, PL 1432.

**LIGHT, HEAT, AND POWER COMPANIES** are within the act I, PL 1375.

meters, must keep tester for II, w, PL 1385.

quality of product, Commission is judge of V, 1, PL 1403.

**LIMITATION**

of the act I, PL 1375.

of suits for damages for excessive charges V, 5, PL 1405.

of suits for penalties VI, 44, PL 1432.

**LIVESTOCK**, distribution of facilities may favor II, n, PL 1382.

**MANDAMUS** to enforce

obedience of orders of Commission VI, 33, 34, PL 1429.

payment of damages to property owners V, 12, PL 1411.

**MANUFACTURER**, of gas, electricity, etc., for private use, is not within the act I, PL 1375.

**MAPS**. See **RECORDS**.

**MERGER**

- approval of V, 18, 19, PL 1414.
- capitalization upon III, 6, a, PL 1392.
- power to merge III, 3, c, PL 1388.
- valuation of franchises upon V, 21, PL 1416.

**METERS**, tester to be kept by companies II, w, PL 1385.

**MUNICIPALITIES**

- are not "corporations" within the act I, PL 1375.
- contracts with companies to be approved III, 11, PL 1395. (See VI, 54, PL 1436.)
- to be filed II, g, PL 1379.
- contracts concerning crossings III, 5, PL 1391; V, 1, PL 1410.
- definition of I, PL 1376.
- engaged in furnishing public service:
  - approval of Commission III, 3, d, PL 1388.
  - must file reports, etc. II, i, PL 1380; V, 15, PL 1413.

**NATURAL GAS CORPORATIONS** are within the act I, PL 1375.

**NOTICE OF**

- accidents II, x, PL 1386.
- application for change of rates II, f, PL 1379.
- for injunction VI, 31, PL 1429.
- change in rates, to be filed, etc. II, f, PL 1379.
- when 30 days not necessary V, 4, PL 1404.
- hearing—generally V, 19, PL 1415; VI, 7, PL 1423.
- concerning crossings V, 12, PL 1409.
- concerning valuation V, 21, PL 1417.

**NOTIFICATION, CERTIFICATE OF.** See **CERTIFICATE.**

**OFFICERS**

- disobedience of orders VI, 35, PL 1430; VI, 39, PL 1431.
- of subpoena VI, 4, PL 1421.
- misdemeanor, what is a VI, 37, 38, PL 1430, 31.
- penalty, when not liable VI, 41, PL 1432.

**OPINIONS of the Commission**

- copy certified to court in appeals VI, 18, PL 1426.
- filing of VI, 11, PL 1423.

**ORDERS**

- amendment of VI, 12, PL 1423; VI, 16, PL 1424.
- companies must obey II, y, PL 1386.
- copies must be filed on appeal VI, 18, PL 1426.
- court order to enforce Commission's subpoena VI, 3, PL 1421.
- injunction to stay VI, 31, PL 1429.
- penalty for violation VI, 35, 36, 39, PL 1430, 31.
- power of Commission to make V, 27, 28, PL 1419.
- reparation V, 5, PL 1405; VI, 17, PL 1425.
- service and return of VI, 13, PL 1424.
- violation of VI, 9, PL 1423.
- written order to be filed after hearing VI, 10, 11, PL 1423.

## PARTIES

costs may be placed upon VI, 2, PL 1421.

who may join on appeal VI, 20, PL 1426.

PASSES, to whom allowed III, 9, b, PL 1394.

## PAYMENTS

advance, minimum, discount, etc. III, 1, c, PL 1387.

damages to property owners V, 12, PL 1411.

finances, are payable to the Secretary VI, 43, PL 1432.

for service rendered by shippers III, 1, e, PL 1387.

## PENALTIES

are cumulative VI, 42, PL 1432.

limitation of actions for VI, 44, PL 1432.

officers, false statements by VI, 37, 38, PL 1431.

payable to the Secretary VI, 43, PL 1432.

right of company to impose III, 1, c, PL 1387.

violation of orders VI, 35, PL 1430; VI, 39, PL 1431.

each day a separate offense VI, 36, PL 1430.

when companies and officers not liable VI, 41, PL 1432.

PERISHABLE GOODS, distribution of cars may favor II, n, PL 1382.

PERJURY VI, 1, PL 1420.

PERSONS within the act, defined I, PL 1376.

PETITION. See also PRACTICE.

by Commission to Interstate Commerce Commission V, 11, PL 1408.

procedure by VI, 6, PL 1422.

PIPE LINE CORPORATIONS are within the act I, PL 1375.

POWER CORPORATIONS. See LIGHT, HEAT, AND POWER.

## PRACTICE AND PROCEDURE

In general to enforce the act VI, 33, 34, PL 1429.

1. *Before the Commission.* VI, 1-17, PL 1420-1424.

complaint, satisfaction of VI, 7, PL 1422.

costs of hearing VI, 2, PL 1421.

depositions VI, 5, PL 1422.

evidence, production of VI, 1, PL 1420.

hearings, on motion of Commission VI, 8, PL 1423.

on motion of party VI, 6, 7, PL 1422.

for violation of order VI, 9, PL 1423.

stenographic notes of VI, 7, PL 1423.

written order after VI, 10, 11, PL 1423.

opinions of the Commission VI, 11, PL 1423.

orders and awards, appeals from VI, 17, PL 1425.

amendment of, on rehearing VI, 12, PL 1423.

service and return VI, 13, PL 1424.

parties, right of intervention VI, 14, 17, PL 1424, 5.

petition and answer, contents, service of VI, 6, PL 1422.

rehearing, application for VI, 14-16, PL 1424.

for amendment of order VI, 12, PL 1423.

- rules of practice VI, 1, PL 1420.
- subpoena, compelling obedience of VI, 3, 4, PL 1421.
- service of VI, 2, PL 1420.
- 2. *On appeal to the Courts.* VI, 17-32, PL 1424-29.
  - answer, filing and service of VI, 21, PL 1427.
  - bond VI, 19, PL 1426.
  - burden of proof VI, 23, PL 1427.
  - costs VI, 18, 24, PL 1426, 1427.
  - decree VI, 24, PL 1427.
  - errors, specifications of VI, 17, PL 1425.
  - evidence admissible VI, 25, PL 1428.
  - injunction to stay order VI, 31, PL 1429.
  - jury trial VI, 17, PL 1425; VI, 29, PL 1428.
  - notice to Commission, of appeal taken VI, 18, PL 1425.
    - of petition for injunction VI, 31, PL 1429.
  - parties, who may be made VI, 20, PL 1426.
  - pleadings VI, 21, PL 1427.
  - powers of the court VI, 22, PL 1427.
  - precedence on court calendar VI, 28, PL 1428.
  - process, service, etc., same as civil actions VI, 26, PL 1428.
  - service of answers VI, 21, PL 1427.
  - supersedeas, when appeal shall be VI, 19, PL 1426.
  - Supreme Court, appeal to VI, 30, PL 1428.
- PREFERENCE. See DISCRIMINATION.
- PROPERTY OWNERS.
  - notice to, of hearings concerning crossings V, 12, PL 1409.
  - recovery of damages by V, 12, PL 1410.
- PUBLIC RECORDS. See RECORDS.
- PUBLIC SERVICE COMPANIES
  - charter and franchises, renewal of III, 3, a, PL 1388.
  - civil liability of VI, 40, PL 1432.
  - contracts with municipalities III, 11, PL 1395 (VI, 54, PL 1436).
  - definition of I, PL 1375.
  - duties of II, PL 1377-86:
    - accidents, to give notice of II, x, PL 1386.
    - accounts, to carry depreciation account V, 15, PL 1413.
      - to use system prescribed II, i, PL 1380.
    - bill of lading, to issue II, q, PL 1383.
    - connections, with lateral railroads II, o, PL 1382.
      - telegraph lines II, u, PL 1385.
      - telephone lines II, v, PL 1385.
    - crossings, to construct II, t, PL 1384.
    - filing, certificate of notification III, 4, b, PL 1389.
      - contracts, leases, etc. II, g, PL 1379.
    - joint tariffs II, e, PL 1378.
    - reports and accounts II, h, PL 1380.



- tariffs and schedules II, d, PL 1378; III, 7, PL 1393; VI, 54, PL 1436.
- furnish, adequate facilities II, m, n, PL 1381, 2.
- continuous service II, p, s, PL 1383, 4.
- maps, profiles, etc. II, k, PL 1381.
- service and facilities II, a, PL 1377.
- transfers II, r, PL 1383.
- meters, to keep a tester for II, w, PL 1385.
- orders of Commission, to obey II, y, PL 1386.
- orders of court, to obey VI, 32, PL 1429.
- rates, to charge reasonable II, b, PL 1377.
- to file notice of change of II, f, PL 1379.
- records, to keep within the Commonwealth II, j, PL 1380.
- repairs and improvements, to make II, c, PL 1377.
- securities, to account for proceeds of II, l, PL 1381.
- to file Certificate of Notification upon issuing III, b, c, PL 1389, 90.
- incorporation of III, 2, a, PL 1388.
- operation, filing schedules condition precedent to III, 7, PL 1393.
- penalty, when not liable to VI, 41, PL 1432.
- powers of III, PL 1386-95.
- charter, to renew and extend III, 3, a, PL 1388.
- classify, rates and services III, 1, b, PL 1387.
- complain to the Commission III, 1, d, PL 1387.
- controlling rights, to purchase III, 6, c, PL 1392.
- foreign corporations III, 3, b, PL 1388.
- improvements, to enjoy returns from III, 1, a, PL 1387.
- municipalities may supply service III, 3, d, PL 1388.
- payment to shipper for services III, 1, e, PL 1387.
- rates, to charge reasonable III, 1, a, PL 1386.
- to make sliding scale of III, 1, a, PL 1386.
- rights, to enjoy upon incorporation III, 2, b, PL 1388.
- rules and regulations, to make III, 1, c, PL 1387.
- sale, assignment, merger, etc. III, 3, c, PL 1388.
- securities, to issue III, 4, a, PL 1389.
- valuation, to receive certificate of III, 4, a, PL 1389.
- prior rights unaffected by this act III, 12, PL 1395.
- PUBLISHING**
- joint tariffs and schedules II, e, PL 1378.
- tariffs and schedules II, d, PL 1378; V, 16, PL 1413.
- notice of change of II, f, PL 1379.
- PULLMAN CAR CORPORATIONS.** See COMMON CARRIERS.
- PURCHASE** of controlling rights in other companies III, 6, c, PL 1392.
- QUO WARRANTO** by Attorney General VI, 34, PL 1429.
- RAILROAD COMMISSION**, transfer to Public Service Commission VI, 52, 54, PL 1435, 36.

**RAILROAD CORPORATIONS.** See also **COMMON CARRIERS,**  
**PUBLIC SERVICE COMPANIES.**

continuous service II, s, PL 1384.

crossings, see *Crossings*.

definition of I, PL 1376.

switch connections II, o, PL 1382; V, 7, PL 1406.

**RATES**

allowance to shipper for services III, i, c, PL 1387.

appeal from rates fixed shall be a supersedeas VI, 19, PL 1426.

classification of III, i, b, PL 1387.

demurrage, track storage, etc. V, 17, PL 1414.

discrimination, see *Discrimination*.

filing and posting, when it relieves from liability VI, 41, PL 1432.

inadequate V, 3, PL 1404.

joint rates, apportionment of V, 10, PL 1408; II, v, PL 1385.

filing of II, c, PL 1378.

long and short hauls III, 9, a, PL 1394.

long and short transmission of messages III, 10, PL 1394; V, 1, PL 1402.

maximum rates V, 3, PL 1404.

mistake in charge, effect of III, 8, a, PL 1393.

reasonable, duty to charge II, b, PL 1377.

hearing to determine V, 3, PL 1403.

regulation of, power of Commission V, 1, PL 1402, 3.

right of company to collect III, 1, a, PL 1386.

service exchanged with other companies III, 9, b, PL 1394.

special rates on excursion tickets, etc. III, 9, b, PL 1394.

others forbidden III, 8, a, PL 1393.

tariffs and schedules, see *Tariffs and Schedules*.

zone system allowed III, 9, a, PL 1394; III, 10, PL 1395.

**RECORDS**

*1. Of Companies.*

Commission to have access to at all times V, 15, PL 1413; V, 21, PL 1417; V, 23, PL 1418.

copies of to be furnished to the Commission II, k, PL 1381; V, 15, PL 1413; VI, 2, PL 1420.

Interstate Commerce Commission system used V, 15, PL 1413.

must be kept within the state II, j, PL 1380; VI, 4, PL 1421.

supervision of Commission II, i, PL 1380; V, 15, PL 1413.

*2. Of the Commission.*

certified to Attorney General on investigation of stock issue V, 14, PL 1412.

certified to court on appeal VI, 18, PL 1426.

stenographic notes of hearings VI, 7, PL 1423.

*3. Of the Commonwealth and its municipal corporations.*

right of the Commission to examine V, 23, PL 1418.

**4. Public Records.**

certificates of Notification are III, 4, d, PL 1390.

reports of accidents are not IV, 8, PL 1399.

REFRIGERATING CORPORATIONS are within the act I, PL 1375.

REHEARINGS VI, 12, PL 1423; VI, 14-16, PL 1424.

REMEDY. See ACTIONS, PRACTICE.

REORGANIZATION. See also MERGER.

securities, issue of III, 6, b, PL 1392.

valuation of V, 21, PL 1416.

**REPAIRS**

Commission's power to supervise V, 1, PL 1402; V, 13, PL 1412.

duty of companies to make II, c, PL 1377.

REPARATION in case of excess charges V, 5, PL 1405.

REPEALS. See ACTS REPEALED.

**REPORTS**

accidents, reports of II, x, PL 1386.

report of investigator of IV, 8, PL 1399.

annual report of the Commission VI, 48, PL 1433.

filing of II, h, PL 1380; V, 15, PL 1413.

power of Commission to compel V, 25, PL 1418.

form of V, 25, PL 1419.

sale of securities, report of proceeds V, 22, PL 1418.

REVALUATION, Commission may make V, 20, b, PL 1416.

ROUTES, power of Commission to regulate V, 1, PL 1402; V, 17, PL 1414.

**RULES AND REGULATIONS**

of companies, concerning schedules II, d, PL 1378.

must be reasonable V, 2, PL 1403.

right to make III, 1, c, PL 1387.

of Commission V, 26, 27, 28, PL 1419. See PRACTICE.

**SALE OF**

property and franchises III, 3, c, PL 1388; V, 18, PL 1414.

securities,

accounting for II, 1, PL 1381; V, 22, PL 1418.

held in the treasury III, 4, c, PL 1390.

**SCHEDULES. See also TARIFFS AND SCHEDULES.**

time schedules, arrangement of II, r, PL 1383; V, 6, PL 1406.

change of II, m, PL 1381; V, 17, PL 1414.

**SECURITIES**

accounting for proceeds of II, 1, PL 1381; V, 22, PL 1418.

controlling interest, purchase of III, 6, c, PL 1392; V, 18, PL 1414.

false statements concerning VI, 38, PL 1431.

fictitious issue of, void III, 4, a, PL 1389.

investigation of by Commission V, 14, PL 1412.

issue, power to III, 4, a, PL 1389.

issue for 12 mo. or less III, 4, d, PL 1390.

refunding such securities III, 4, d, PL 1391.

issued prior to Jan. 1, 1914, unaffected III, 4, d, PL 1391.

merger, amount to be issued upon III, 6, a, PL 1392.

Notification, filing certificate of III, 4, b, c, PL 1389, 90.

regulation of issue by Commission V, 1, PL 1403.

reorganization, issue upon III, 6, b, PL 1392.

unlawful issue a misdemeanor VI, 37, PL 1430.

valuation of V, 21, PL 1416, 17.

application for certificate of III, 4, a, PL 1389.

## SERVICE

adequate, duty to furnish II, a, PL 1377; II, m, PL 1381.

hearing to determine adequacy of V, 2, PL 1403.

classification, right to make III, 1, b, PL 1387.

continuous service, duty to render II, p, PL 1383.

definition of I, PL 1376.

exchange of, between companies III, 9, b, PL 1394.

payment for services of shipper III, 1, e, PL 1387.

regulation of V, 1, PL 1402; V, 17, PL 1414.

right to charge for III, 1, a, PL 1386.

standard of V, 13, PL 1412.

SEWAGE CORPORATIONS are within the act I, PL 1375.

## SHIPPERS

application for switch connections II, o, PL 1382.

may receive certificate of excess payment V, 4, PL 1405.

may receive payment for services rendered III, 1, e, PL 1387.

weighing and billing of property V, 17, PL 1414.

SIDINGS, power of Commission to supervise construction of V, 1, PL 1403.

SIGNALS, power of Commission to prescribe V, 12, PL 1409.

SLIDING SCALE OF RATES allowed III, 1, a, PL 1386.

STAGE LINE CORPORATIONS are within the act I, PL 1375.

STATIONS, power of Commission to determine location of V, 1, PL 1403.

STOCKS. See SECURITIES.

STREET RAILWAYS. See also COMMON CARRIERS, PUBLIC SERVICE COMPANIES.

crossings. See Crossings.

definition of I, PL 1376.

freight, through transportation of II, s, 1384; V, 7, PL 1406.

routes, regulation of by Commission V, 1, PL 1402.

transfers, shall provide for II, r, PL 1383; V, 6, PL 1406.

## SUBPŒNA

avoiding service of VI, 4, PL 1421.

disobedience of VI, 3, 4, PL 1421.

fees for service of VI, 2, PL 1421.

general power of Commission V, 24, PL 1418.

service of VI, 2, PL 1420.

**SUPERSEDEAS**

application for rehearing shall not be VI, 15, PL 1424.

interlocutory order of court VI, 19, PL 1426.

effect of VI, 36, PL 1430.

**SWITCH CONNECTIONS**

duty to construct II, o, PL 1382; II, s, PL 1384.

expense of construction II, o, PL 1382.

power of Commission over V, 1, PL 1403; V, 7, PL 1406.

**TARIFFS AND SCHEDULES**

change of II, f, PL 1379; V, 4, PL 1404.

duty to file II d, PL 1378.

filing of, condition precedent to operation III, 7, PL 1393.

relieves from penalty VI, 41, PL 1432.

form of, Commission may prescribe V, 16, PL 1413.

for common carrier II, d, PL 1378.

joint rates, schedules of II, e, PL 1378.

**TELEGRAPH AND TELEPHONE COMPANIES. See also PUBLIC SERVICE COMPANIES.**

connections with other lines V, 8, 9, PL 1407.

continuous service II, p, PL 1383; II, u, v, PL 1385.

exchange of service at reduced rates III, 9, b, PL 1394.

short and long transmission of messages III, 10, PL 1394; V, 1, PL 1402.

**TESTIMONY. See EVIDENCE, EXAMINERS, RECORDS.****THROUGH ROUTES** to be provided for transmission of messages II, v, PL 1385; V, 8, 9, PL 1407.

for transportation of freight II, s, PL 1384; V, 7, PL 1406.

**TRANSFER OF FRANCHISES. See SALE.****TRANSFERS**

duty to provide II, r, PL 1383.

power of Commission to regulate V, 1, PL 1402; V, 6, PL 1406.

**TUNNEL CORPORATIONS** are within the act I, PL 1375.**TURNPIKE CORPORATIONS** are within the act I, PL 1375.**VIOLATION OF ORDERS, Etc.,** penalty for VI, 35, 36, PL 1430.**VALUATION**

certificate of III, 4, a, PL 1389.

Commission may prescribe the form and substance of data in preparing valuations V, 20, c, PL 1416.

hearings to determine V, 21, PL 1416.

of crossings paid for by Commonwealth V, 12, PL 1410.

of franchises upon merger III, 6, a, b, PL 1392.

records to be furnished to aid II, k, PL 1381.

revaluation V, 20, b, PL 1416.

what matters may be considered V, 20, a, PL 1415.

**WARRANT** for payment of damages V, 12, PL 1411.

**WATER CORPORATIONS** are within the act I, PL 1375.

Commission is judge of quality of product V, I, PL 1403.

Courts no longer control. See ACTS, portions of Act of 1874 repealed.

shall keep tester for meters II, w, PL 1385.

**WATERING STOCK** forbidden III, 6, a, b, PL 1392.

**WATER SUPPLY COMMISSION**, powers unaffected VI, 45, PL 1433.

**WHARF CORPORATIONS** are within the act I, PL 1375.

Commission may determine location of wharves V, I, PL 1403.

**WITNESSES**

aid of courts to compel attendance of VI, 3, PL 1421.

Commission's power to summon V, 24, PL 1418.

fees and mileage of VI, 2, PL 1420.

testimony of VI, 1, PL 1420.

**ZONE SYSTEM** of rates allowed III, 9, a, PL 1394; III, 10, PL 1395.

**THE PUBLIC SERVICE COMPANY LAW.****Approved July 26, 1913.—Effective for all Purposes January 1, 1914****No. 854.\*****AN ACT.<sup>1</sup>**

[\*1374] Defining public service companies; and providing for their regulation by prescribing and defining their duties and liabilities; prescribing, defining, and limiting their powers, and regulating their incorporations, and to a limited extent regulating municipal corporations engaged or about to engage in the business of public service companies; creating and establishing a Public Service Commission for the regulation aforesaid; prescribing and defining the powers and duties of such Commission and its officers, including the exclusive power to regulate the construction, alteration, relocation, or abolition of the crossings of railroad corporations, street railway corporations, or other public service companies, and of public highways by the tracks or other facilities of said companies: providing for the ascertainment by the Commission of the expense and damages resulting from such construction, alteration, relocation, or abolition, and for the payment of such expense and damages, severally or proportionately, by the public service companies interested, the State, or municipal corporation concerned, and giving persons whose property is thereby taken, injured, or destroyed, authority to sue the Commonwealth for damages in such cases; providing for the terms, salaries, and compensation of the members of the commission, its officers, counsel, and employes; prescribing and regulating the practice and procedure before such commission, and upon appeal and judicial review of its orders and determinations by the courts of common pleas; and giving the court of common pleas of Dauphin County exclusive jurisdiction of such appeals in certain cases, and of all injunctions, mandamus, or other appropriate proceedings to enforce the provisions of this act and the orders of the commission, and to restrain such orders, subject to an appeal to the Supreme Court; prescribing penalties, fines, and imprisonment for the violation of the provisions of this act and for the violation of the orders of said commission; making it the duty of the Public Service Commission to enforce the provisions of the act approved the nineteenth day of June, one thousand nine hundred and eleven, entitled "An act to promote the safety of travelers and employes on railroads, by compelling common carriers by railroad to properly man their trains," by amending section nine thereof; repealing the act approved the thirty-first day of May, one thousand nine hundred and

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1. Similar act in Arizona held not unconstitutional because of the failure of the title to set forth specifically that "persons" conducting a public service business were included within the terms of the act. *Van Dyke v. Geary*, 218 Fed. 111.

seven, which provided for the appointment of the Pennsylvania State Railroad Commission; and sections one and two of the act, approved the fourth day of June, one thousand eight hundred and eighty-three, entitled "An act to enforce the provisions of the seventeenth article of the Constitution, relative to railroads and canals"; and an act, entitled "To provide the maximum car service charges, including car storage charges, that railroad companies and corporations, or associations, may charge and collect on each car loading, and not unloaded within the free time for unloading cars, and fixing the free time that shall be allowed for unloading cars," approved twenty-fourth day of May, Anno Domini one thousand nine hundred and seven; and the proviso of clause three and the provisos of clause seven of section thirty-four of the act, entitled "An act to provide for the incorporation and regulation of certain corporations," approved the twenty-ninth day of April, one thousand eight hundred and seventy-four, and all other legislation inconsistent with or supplied by this act.

[\*1375]

## ARTICLE I.\*

## Definitions.

Section 1. Be it enacted, &c., That this act shall be known, and may be cited, as "The Public Service Company Law."

The term "Public Service Company," when used in this act, includes all railroad corporations, canal corporations, street railway corporations, stage line corporations, express corporations, baggage transfer corporations, pipe line corporations,<sup>2</sup> ferry corporations, common carriers, Pullman car corporations, dining car corporations, tunnel corporations, turnpike corporations, bridge corporations, wharf corporations, incline plane corporations, grain elevator corporations,<sup>3</sup> telegraph corporations, telephone corporations,<sup>4</sup> natural gas corporations, artificial gas corporations, electric corporations, water corporations, water-power corporations, heat corporations, refrigerating corporations, sewage corporations, doing business within this State, and also all persons engaged for profit<sup>5</sup> in the same kind of business within this Com-

2. United States v. Ohio Oil Co., 234 U. S. 548, 58 L. Ed. 1459.

3. State Pub. Ut. Com. v. Monarch Refrigerating Co., 267 Ill. 528, 108 N. E. 716.

4. Wolverton v. Mountain States Tel. & Tel. Co. (Colo.), 142 Pac. 165.

5. (a) This act does not apply to persons conducting a private telephone line. *Van Camp v. Plainfield R. B. Tel. Co.*, 1 P. S. C. Rep. 183.

(b) Mutual companies are "engaged for profit." *Pioneer Tel. & Tel. Co. v. State (Okla.)*, 144 Pac. 1060.



monwealth.<sup>6</sup> Provided, however, Such persons and corporations shall not be subject to the provisions of this act, with respect to any business transacted or any property owned by them outside of the Commonwealth of Pennsylvania; nor shall the provisions of this act be so construed as to extend to any matter or thing which, under the Federal Constitution, the Congress of the United States has the exclusive power to regulate,<sup>7</sup> or which the Congress

6. (a) It is the duty which the company owes to the public, not the use which the consumer makes of the commodity furnished, which makes it a public service company. *Pinney & Boyle Co. v. Los Angeles G. & E. Corp. (Cal.)*, 141 Pac. 620.

(b) Under this section public service companies are divided into two classes, i. e. (1) corporations, and (2) all persons engaged for profit in the same kind of business. *Penna. Utilities Co. v. Lehigh Nav. Elec. Co.*, 2 P. C. R. 74, affirmed 2 P. C. R. 422.

(c) A corporation formed for the purpose of "producing, distributing, refining and manufacturing petroleum" is not a public service company. *Application Docket No. 33*, 1 P. S. C. Rep. 348.

7. **A. Scope of Federal Authority.** (a) Whenever a valid federal regulation covers a subject within the sphere of the federal law, it is paramount; and any and all conflicting state regulations on such subject are ipso facto wholly excluded therefrom. *Flanders v. Georgia S. & F. Ry. Co. (Fla.)*, 67 So. 68.

(b) A contract for an interstate shipment must be construed with reference to the federal decisions, without regard to the rules prevailing in a state. *Riddler v. Missouri Pac. Ry. Co. (Mo.)*, 171 S. W. 632; *Howard & Callahan v. Ill. Cent. R. Co. (Ky.)*, 171 S. W. 442; *Bailey v. Mo. Pac. Ry. Co. (Mo.)*, 171 S. W. 44; *Adams Ex. Co. v. Cook (Ky.)*, 172 S. W. 1096; *Potter v. Kansas Cy. So. Ry. Co. (Mo.)*, 172 S. W. 1153; *Dunlap v. Chi. & A. Ry. Co. (Mo.)*, 172 S. W. 1178.

(c) Congress has power to regulate not only interstate commerce but also intrastate commerce to such extent as the latter may directly affect the former. *Texas & P. Ry. Co. v. U. S.*, 205 Fed. 380, affirmed in 234 U. S. 342, 58 L. Ed. 1341. Cf. *Simpson v. Shepard (Minnesota Rate Cases)*, 48 L. R. A. (N. S.) 1151, 230 U. S. 352, 57 L. Ed. 1511, 33 Sup. Ct. 729.

**B. Scope of State Authority.** (a) The state has full power over commerce purely intrastate. It may provide for local improvements or facilities and adopt reasonable measures in the interest of the health, safety and welfare of the people, notwithstanding such regulations may incidentally and indirectly involve interstate commerce. *S. Covington & C. S. R. Co. v. Covington*, 235 U. S. 537, 59 L. Ed. —; *Minnesota Rate Cases*, supra; *L. & N. R. Co. v. Higdon*, 234 U. S. 592, 58 L. Ed. 1484;

*Atl. C. L. R. Co. v. Georgia*, 234 U. S. 280, 58 L. Ed. 1312. But the state cannot impose burdens which amount directly to a regulation of interstate commerce. *Welch v. Dean* (Mont.), 141 Pac. 548. Cf. *State v. Northern Ex. Co.* (Wash.), 141 Pac. 757. A state commission cannot prescribe the terms upon which switching movements which are a part of interstate movements, shall be made. *Ill. Cent. R. Co. v. De Fuentes*, 236 U. S. 157, 59 L. Ed. —.

(b) A state has the right to fix rates for ferriage across a boundary stream to another state, until Congress regulates such rates. *Port Richmond & B. P. F. Co. v. Board of Freeholders*, 234 U. S. 317, 58 L. Ed. 1330.

**C. Is Commerce Interstate or Intrastate?** (a) This question must be determined by the essential character of the commerce, and not by mere billing or forms of contract. *R. R. Commission v. Worthington*, 225 U. S. 101, 56 L. Ed. 1004, 32 Sup. Ct. 653; *Texas & N. O. R. Co. v. Sabine Tram Co.*, 227 U. S. 111, 57 L. Ed. 442, 33 Sup. Ct. 229; *R. R. Commission v. Texas & P. R. Co.*, 229 U. S. 336, 57 L. Ed. 1215, 33 Sup. Ct. 837; *Bailey v. Missouri Pac. Ry. Co.* (Mo.), 171 S. W. 44; *Potter v. Kansas Cy. So. Ry. Co.* (Mo.), 172 S. W. 1153; *S. Covington & C. S. R. Co. v. Covington*, 235 U. S. 537, 59 L. Ed. —; *Ill. Cent. R. Co. v. De Fuentes*, 236 U. S. 157, 59 L. Ed. —.

(b) Where incoming freight is delivered to an industry upon the carrier's interchange tracks and later the same cars are engaged in an intra-plant movement, *held*, that though the incoming movement be interstate, it is completed by delivery at the interchange tracks, and the Public Service Commission has full jurisdiction over the subsequent intra-plant movement. *Crucible Steel Co. v. P. R. R. Co.*, 1 P. C. R. 49; *Same v. Same*, 2 P. C. R. 599.

(c) An industrial railroad, in so far as it forms a link in the through transportation of goods from one state to another, is engaged in interstate commerce. *Crane R. R. Co. v. C. R. R. of N. J.*, 2 P. C. R. 224, affirmed in 248 Pa. 333.

(d) The fact that only a few cars in a train are engaged in intrastate commerce does not work such a confusion of interstate and intrastate shipments as to cause the latter to lose their identity as such or to exempt them from state control. *State v. Kansas Cy. Stockyards Co.* (Kans.), 145 Pac. 831.

(e) A shipment moving through part of an adjoining state in transit from one point to another in this state, is an interstate shipment, and is beyond the jurisdiction of the Public Service Commission. *Keystone Bone Fertilizer Co. v. P. R. R. Co.*, 1 P. S. C. Rep. 185. But shipments passing upon the high seas en route from one point to another within the same state, are within the control of a state commission. *Wilmington Transp. Co. v. R. R. Com. of Cal.*, 166 Cal. 741, 137 Pac. 1153, affirmed in 236 U. S. 151, 59 L. Ed. —.

has, under said Constitution, in the exercise of its concurrent power, in fact regulated, to the exclusion of the concurrent power of the several States: And provided further, That none of the provisions of this act shall apply to the generation, transmission, or distribution of electricity; to the manufacture or distribution of gas; to the furnishing or distribution of water; or to the production, delivery, or furnishing of steam, or any other substance for heat or power, by a producer, who is not otherwise a public service company, for the sole use of such producer, or for the use of tenants of such producer, and not for sale to others.<sup>8</sup>

The term "Corporation," as used in this act, shall be construed to include all bodies corporate, joint stock companies, or associations, domestic or foreign, their lessees, assignees, trustees, receivers, or other successors in interest, having any of the powers or privileges of corporations not possessed by individuals or partnerships, and shall not include municipal corporations, except as otherwise provided in this act.

[\*1376] \*The term "Municipal Corporation," as used in this act, shall include all cities, boroughs, towns, townships, or counties, created or organized under any general or special law of this Commonwealth.

The term "Person," as used in this act, means all individuals,<sup>9</sup> partnerships, or associations, other than corporations.

The term "Railroad Corporation," as used in this act, includes every corporation owning, leasing, operating, or managing or controlling, any railroad for public use within this Commonwealth.

The term "Railroad," as used in this act, includes every railroad other than a street railway, by whatsoever power operated, for public use in the conveyance of passengers or property, or both,

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(f) Fixing a rate for the sale of natural gas is not an unlawful interference with interstate commerce, though some of the gas be piped from another state. *Manufacturers' L. & H. Co. v. Ott*, 215 Fed. 940. Cf. *Minnesota Rate Cases*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511; 48 L. R. A. (N. S.) 1151.

8. This proviso exempts from the action of this statute a municipality which manufactures electricity for lighting its streets. *Borough of Gettysburg's Petition*, 2 P. C. R. 331.

9. *Van Dyke v. Geary*, 218 Fed. 111.

with all bridges, ferries, tunnels, facilities, plant, and equipment thereof.

The term "Street Railway Corporation," as used in this act, includes every corporation owning, leasing, operating, or managing or controlling, any street railway within this Commonwealth.

The term "Street Railway," as used in this act, includes every railroad and railway, by whatsoever power operated, or any extension or extensions thereof, for public use in the conveyance of passengers or property, or both, being mainly or in part located upon, over, above, below, across, through, or along any street, avenue, road, highway, bridge, or public place, including the facilities, plant, and equipment thereof.

The term "Common Carrier," as used in this act, includes any and all common carriers,<sup>10</sup> whether corporations or persons, engaged for profit in the conveyance of passengers or property, or both,<sup>11</sup> between points within this Commonwealth, by, through, over, above, or under land or water, or both.<sup>12</sup>

10. (a) To bring a person within the description of a common carrier he must exercise the business as a public employment, he must undertake to carry goods for persons generally, and hold himself out as ready to transport goods for hire as a business, not as a casual occupation. . . . It is not necessary that he carry both passengers and freight, or that he carry all kinds of freight. *Anderson v. Smith-Powers Logging Co.*, 139 Pac. 736, 739; *Campbell v. A. B. C. Storage & Van Co. (Mo.)*, 174 S. W. 140; *Orr & Lanning v. Boockholdt (Ala.)*, 65 So. 430.

(b) The decision of the Pennsylvania Supreme Court that certain railroads are common carriers, will be followed by the Public Service Commission. *Monongahela Connecting R. R. Co. v. P. & L. E. R. R.*, 1 P. C. R. 183. So called "industrial railways" are common carriers. *Crane R. R. v. C. R. R. of N. J.*, 2 P. C. R. 224, affirmed in 248 Pa. 333.

(c) Draymen or truckmen, transporting goods and merchandise within a city, are common carriers. *Lawson v. Connolly*, 45 L. R. A. (N. S.) 1152, 141 N. W. 623; *Campbell v. A. B. C. Storage & Van Co. (Mo.)*, 174 S. W. 140. Taxicab companies are common carriers. *Donnelly v. P. & R. Ry. Co.*, 53 Pa. Super. 78; but a liveryman is not. *Georgia Life Ins. Co. v. Easter (Ala.)*, 66 So. 514.

11. A stock-yard corporation, operating tracks for transportation of live stock in and out of its yards, and charging rates therefor under a tariff filed with the Interstate Commerce Commission, is a common carrier. *State v. Kansas Cy. S. Co. (Kans.)*, 145 Pac. 831.

12. A company that owns and maintains refrigerator, tank and box cars

The term "Conveyance of passengers or property," as used in this act, includes any and all service in connection with the receiving, transportation, elevation, transfer in transit, ventilation, refrigeration, icing, storage, handling, and delivering of property, baggage, or freight, as well as any and all service in connection with the transportation or carrying of passengers.

The term "Service" is used in this act in its broadest and most inclusive sense, and includes any and all acts done, rendered or performed, and any and all things furnished or supplied, and all and every the facilities used or furnished or supplied by public service companies in the performance of their duties to their patrons, employes, and the public, as well as the interchange of facilities between two or more public service companies.<sup>13</sup>

The term "Facilities," as used in this act, includes all plant and equipment of a public service company,<sup>14</sup> which includes all [\*1377] tangible real and personal property, buildings, materials, easements, right of way, rights of trackage, subways, tunnels, railroads, street railways, tracks, canals, and all animals, locomotives, apparatus, appliances, devices, instruments, appurtenances, freight cars, refrigerator cars, baggage cars, express cars, passenger cars, drawing-room cars, parlor cars, sleeping cars, dining cars, rolling stock, carriages, cabs, hansoms, taxicabs,<sup>15</sup> vehicles, boats, ships, vessels, bridges, barges, cables, conduits, converters, transformers, condensers, wires, poles, structures, telegraph lines, telephone lines, cross bars, engines, machines,

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and lets these cars to the railroads or to shippers, and owns and operates icing stations on various lines of railway, and from these ices and re-ices the cars when set by the railroads at the icing plant, etc., but has no control over the motive power or movement of the cars, is not a common carrier. *Ellis v. Interstate Com. Com.*, 237 U. S. 434, 59 L. Ed. —.

13. A switching service is the movement of a car from one point to another within a station or terminal area. *Penna. Rubber Co. v. P. R. R.*, 2 P. C. R. 31.

14. This definition applies to the facilities of municipalities engaged in supplying public service, as well as to companies. *Bethlehem City Water Co. v. Borough of Bethlehem*, 1 P. C. R. 227.

15. The name is a coined one to describe a conveyance similar to a hackney carriage operated by electric or steam power, and held for public hire at designated places, subject to municipal control. *Donnelly v. Phila. & R. Ry.*, 53 Pa. Super. 78.

dynamos, boilers, motors, storage batteries, switchboards, water-falls, water-power stations, power stations, pumping stations, reservoirs, purifiers, oil tanks, gas tanks, holders, retorts, ducts, pipes, pipe galleries, pipe lines, mains, meters, lamps, scrubbers, wharves, piers, docks, ferries, incline planes, side tracks, spurs, turn outs, switches, systems, stations, depots, terminals, terminal facilities, water or gas jet, wells, and any and all other means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with, the business of any public service company: Provided, however, That no property owned by the Commonwealth of Pennsylvania or municipality thereof, at the date when this act becomes effective, shall be subject to the Commission or to any of the terms of this act, except as elsewhere provided herein.

The term "Commission," when used in this act, means the Public Service Commission created by this act.

The term "Commissioner," when used in this act, means one of the members of such Commission.

## ARTICLE II.

### Duties and Liabilities of Public Service Companies.

Section 1. It shall be the duty of every public service company—

(a). To furnish and maintain such service, including facilities, as shall in all respects be just, reasonably adequate,<sup>16</sup> and practically sufficient for the accommodation and safety of its patrons, employees, and the public, and in conformity with such reasonable regulations or orders as may be made by the Commission.<sup>17</sup>

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16. See note 31, post Art. V, Sec. 2.

17. **A. Duty to Render Service—In General.** (a) See Rules and Regulations governing electric, gas, heating and water service. 1 P. C. R. 153-178.

(b) One of the chief purposes of this act is to compel the performance of this duty. *Borough of Schuylkill Haven v. Schuylkill Haven Gas & Water Co.*, 2 P. C. R. 617.

(c) This duty must be performed even though the company be doing a losing business. *Ernat v. Glenside Water Co.*, 2 P. C. R. 119; *Combined Committee etc. v. P. R. R. et al.* (dictum), 2 P. C. R. 390.

(d) Where one public service company purchases another it is bound to discharge the public obligations resting upon the other. *Greensburg Boro. v. Westmoreland Water Co.*, 240 Pa. 481, 87 Atl. 995.

(e) The fact that producing and distributing facilities are owned by different corporations will not relieve them from their duty to the public. They must co-operate in the discharge of that duty. *Grubb v. Bangor Elec. Light, Heat & Power Co.*, 2 P. C. R. 175.

(f) A municipality engaged in supplying public service acts, not in its sovereign capacity, but in the capacity of a private corporation engaged in like business. *Nourse v. City of Los Angeles (Cal.)*, 143 Pac. 801.

(g) Where the power to furnish public service was expressly granted in a charter and exercised for a long time, the company will be required to continue the service. The Commission will not look beyond the charter, but will leave any question as to the legality of the charter provisions to be settled by the courts. *Grubb v. Bangor Elec. Light, Heat & Power Co.*, 2 P. C. R. 175. See also *Borough of Avoca's Petition*, 2 P. C. R. 372.

(h) The charter of a railroad company is not a mere license, but is a contract between the state and the company, and imposes upon the latter the duty of furnishing service to the public until such time as the charter is surrendered by the company and accepted by the state, or until it is forfeited and declared void by the state. A company cannot voluntarily discontinue service because its operations are unprofitable. *Brandt v. Leas, et al.*, 2 P. C. R. 419; *Northern Pac. Ry. v. State (Wash.)*, 147 Pac. 45; *Town of Gassaway v. Gassaway Gas Co. (W. Va.)*, 83 S. E. 189; *Chesapeake & O. Ry. v. Pub. Ser. Com. (W. Va.)*, 83 S. E. 286. But circumstances may justify the abandonment of a line of railroad. *State of Iowa v. Old Colony Trust Co.*, 215 Fed. 307.

**B. Railroad Companies.** (a) In the matter of providing drinking water and sanitary drinking cups in passenger cars and agency stations. See General Order No. 1, 1 P. C. R. 46.

(b) For cases involving station facilities and train and trolley service consult subject index in the back of this volume and index to First Annual Report of the Public Service Commission.

(c) The duty of a railroad company to provide fit roadbeds, tracks and rolling stock may be distinguished from the duty to provide station agencies along its line. The one is an essentially higher and more important duty than the other. In the latter case the fact that the performance of the duty will be unremunerative may be considered in determining the reasonableness of the order requiring it to be performed. *State v. Fla. E. C. R. Co. (Fla.)*, 67 So. 906.

(d) Interstate trains may be required to render adequate local service. *State, ex rel. G. N. Ry. Co. v. Pub. Ser. Com. (Wash.)*, 142 Pac. 684; *Gulf, C. & S. F. Ry. Co. v. State (Tex.)*, 169 S. W. 385.

(e) A railroad operating a six-mile branch line for the use of one consignee will be required to erect a public siding and station, where the accommodation of the public demands it. *Blough v. B. & O. R. R. Co.*, 2 P. C. R. 84.

(f) The commission will not order the installation of additional train service unless evidence of a public demand for it is shown. *Fiscus v. P. & R. Ry. Co.*, 2 P. C. R. 252.

(g) The petitioner requested that the respondent be required to build a foot-bridge over certain tracks which lie between its station and the southern part of the petitioning borough. The investigation of the Commission showed that the respondent had, at its own expense, provided a modern subway about a block from the proposed site of the foot-bridge, and had graded and improved the streets leading thereto; that the subway leads to the center of the borough; and that only a comparatively small number of people would be better served by the erection of a foot-bridge. Held: That the Commission is not warranted in ordering the erection of the foot-bridge, and the complaint should be dismissed. *Borough of Aliquippa v. P. & L. E. R. Co.*, 1 P. C. R. 196.

(h) In re adequate station facilities at Kauffman, Pa., see *Residents etc. v. C. V. R. R. Co.*, 1 P. C. R. 217.

(i) When enough trains are run between O. and S. to accommodate the people of those cities and of the intervening city of F., and two steam trains a day are run which reasonably serve the needs of small intervening points, and these points have the service of an interurban trolley, a railroad cannot be compelled to run additional trains between these points at a net loss of \$3,000. *D. L. & W. R. Co. v. van Santwood*, 216 Fed. 252.

**C. Telephone Companies.** (a) Telephone companies are public service companies and their facilities are devoted to a public use. They are subject to certain well understood duties to the public generally and are bound to conduct their business in a manner conducive to the public benefit. *Wolverton v. Mountain States Tel. & Tel. Co. (Colo.)*, 142 Pac. 165.

(b) A subscriber may demand adequate service at reasonable rates, and if such is not furnished he has his remedy by complaint to the Commission, but he has no right to demand that his telephone be connected with a particular exchange. The exchange systems and zones of service established by a company are the result of its experience, and, in the absence of allegation or evidence to the contrary, will be presumed adequate and proper. *Bonner v. Bell Tel. Co. of Pa.*, 1 P. C. R. 209.

**D. Turnpike Companies.** (a) A turnpike company must keep its roadbed in repair although it be earning a net profit of only two per cent. on its investment. *Zook v. Turnpike Co.*, 2 P. C. R. 194.

**E. Natural Gas Companies.** (a) A natural gas company cannot be compelled to furnish all patrons with all the gas they need, but is bound to serve them with a reasonable degree of equality. *Clairton Steel Co. v. Manufacturers' L. & H. Co.*, 240 Pa. 427, 87 Atl. 998.



(b). To render and furnish all such service at prices, charges, rates, tolls, fares, or compensation that shall be just and reasonable,<sup>18</sup> and in conformity with such reasonable regulations or orders as may be made by the Commission.<sup>19</sup>

(c). To make all such repairs, changes, alterations, and improvements in or to such service, including facilities, as shall be [\*1378] reasonably necessary for the \*accommodation or safety of its patrons, employees, and the public.<sup>20</sup>

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**F. Remedy for Inadequate Service.** The remedy for inadequate or unsatisfactory service is by complaint to the Commission, and not by encouraging competition. *Borough of Exeter's Petition*, 2 P. C. R. 52, (Rehearing denied, Id. 539); *Borough of Avoca's Petition*, 2 P. C. R. 372. For full discussion of effects of competition see *Idaho Power and Light Co. v. Blomquist* (Idaho), 141 Pac. 1083.

18. (a) As to reasonableness of rates see Art. III, Sec. 1, (a) and Art. V, Sec. 3.

(b) Where a joint rate is conceded to be reasonable it may not be cancelled because of a dispute between carriers as to the proper division of it. *Pittsburgh Steel Co. v. P. & L. E. R. Co. et al.*, 2 P. C. R. 86.

19. Where a contract between a telephone company and a subscriber provides for a cancellation upon 10 days notice, and the company cancels the contract and refuses to continue service except at an increased rate, the remedy is by complaint alleging the unreasonableness of the new rate. *Henderson v. Bell Tel. Co.*, 1 P. S. C. Rep. 146.

20. **A. Improvements.** (a) *Mehard v. New Wilmington Water Supply Co.*, 2 P. C. R. 272; *Geer v. Inclined Plane Co.*, 2 P. C. R. 455; *Borough of Mt. Union v. Mt. Union Water Co.*, 2 P. C. R. 698; *Town Council &c. v. Biglerville Water Co.*, 2 P. C. R. 729.

(b) In the matter of installing jacks on street cars. *General Order No. 10*, 1 P. C. R. 182.

(c) Where improvements are necessary in order that the water supplied by a company may be pure and adequate, they must be made although the company be doing a losing business. *Ernst v. Glenside Water Co.*, 2 P. C. R. 119. Necessary improvements to turnpike roadbed must be made though the company be not receiving a fair return on its investment. *Zook v. Turnpike Co.*, 2 P. C. R. 194.

(d) Where a company made a change in its system which rendered useless the fixtures which its customers had purchased for its former service, it was held, that, as the change was not arbitrary or capricious, the company need not supply the new fixtures. *Hunt v. Marianna Electric Co. (Ark.)*, 170 S. W. 96.

(e) A railroad company is under no obligation to furnish scales with which to weigh live stock. *Gt. N. Ry. Co. v. State of Minn. U. S. Adv. Ops.* 1914, 753, 59 L. Ed. —.

(d). Whenever<sup>21</sup> and in the form required by the commission to file<sup>22</sup> with the commission<sup>23</sup> tariffs and schedules, showing prices, charges, rates, fares, tolls, or other compensation asked, demanded, or received for any service rendered or furnished by said company,<sup>24</sup> and, if a common carrier, showing the method of distribution of trains, cars, vehicles, boats, motive power, or other facilities operated or owned by said common carrier. It

**B. Extensions.** (a) See note 17, B, *e. supra*.

(b) A water company whose supply is limited cannot be compelled to extend its mains to territory which it never undertook to serve. *Van Dyke v. Geary*, 218 Fed. 111. Nor to make an extension to supply one taker. *Watson v. French (Me.)*, 92 Atl. 290.

(c) A company will not be required to make an expensive extension of its lines unless there is sufficient business in sight to provide a reasonable return upon its investment. *Lehigh Valley Coal Co. v. Bell Tel. Co.*, 2 P. C. R. 441; *Bixler v. United Elec. Co.*, 2 P. C. R. 609. Where the furnishing of additional train service would involve a net loss of \$25.00 per day, the Commission will not order the installation of such service. *Miners &c. v. P. & R. Ry. Co.*, 1 P. C. R. 99. A street railway company is not obliged to extend its line beyond the termini named in its charter. *City of Scranton v. Scranton Rys. Co.*, 2 P. C. R. 689.

(d) The right of inhabitants of a municipality to compel service to them by a water company through an extension of its system is not an absolute and unqualified right, but is to be determined from a consideration of the reasonableness of the demand therefor. *Lukrawka v. Spring Valley Water Co. (Cal.)*, 146 Pac. 640.

21. In the matter of filing tariffs with the Commission, see *General Order No. 8*, 1 P. C. R. 178. For Rules and Regulations governing form of tariffs and schedules, see *Circular No. 3*, 1 P. C. R. 44.

22. The mere filing of tariffs does not automatically overthrow prior contracts which prescribe rates, where the rates prescribed are not alleged to be unreasonable. *Kaul v. Am. Ind. Tel. Co. (Kan.)*, 147 Pac. 1130.

23. (a) See *Tariff Circulars*, 2 P. C. R. 91-98.

(b) Where tariffs were required to be printed, held: typewritten copies were not sufficient. *Mich. R. R. Com. v. Detroit & M. Ry. Co. (Mich.)*, 150 N. W. 861.

24. A tariff providing that for icing cars the carrier will charge the actual cost, including labor, but that not less than \$2.50 per ton of ice shall be charged, is void for uncertainty, and \$2.50 per ton of ice will be the rate in all cases thereunder. *Cudahy Packing Co. v. Grand Trunk W. Ry. Co.*, 215 Fed. 93.

shall also be the duty of every public service company to post<sup>25</sup> and publish such tariffs and schedules, including, if a common carrier, schedules showing the method of distribution of trains, cars, vehicles, boats, motive power, or other facilities, in every office or station of said public service company open to the public, where payments are made by shippers, consumers, users, or patrons, in such manner, form, and place in such office or station as to be readily accessible, and so that the said tariffs and schedules may be conveniently inspected by the public, and, similarly, in such other places as the commission may require.<sup>26</sup> In case of railroad or other common carriers, telegraph and telephone corporations, such tariffs and schedules shall conform to those required by the Interstate Commerce Commission. Every public service company shall also file with, and as a part of, such tariffs and schedules, and post as directed, all rules and regulations<sup>27</sup> that in any manner affect the said prices, charges, rates,<sup>28</sup> fares, tolls, or other compensation, or the distribution of trains, cars, vehicles, boats, motive power, or other facilities.<sup>29</sup> Upon application, the

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25. Under the Interstate Commerce Act a penalty is provided for failure to keep rates posted at carrier's offices, but posting is not necessary to make the rates legally operative. *Herminghausen v. Ad. Ex. Co. (Ia.)*, 149 N. W. 234.

26. A shipper has no right of action for injury sustained on account of a misquoted rate, where the rate actually charged was the rate filed. This is true even though the rates were not posted in the local station. *Wichita Falls & W. Ry. Co. v. Asher (Tex.)*, 171 S. W. 1114.

27. Where it is not shown that such rules are unreasonable, complaints in regard to their effect in particular cases will be dismissed. *Meter v. Metropolitan Elec. Co.*, 2 P. C. R. 117. See Art. III, Sec. 1, (c), post.

28. (a) Rules and regulations, when filed, must be applied to all without discrimination. *Good Shepherd Home v. Lehigh Valley L. & P. Co.*, 2 P. C. R. 187.

(b) A rule showing the exact circumstances and conditions under which discounts for prompt payment are allowed, or penalties for non-payment imposed, must be filed with the Commission. *Administrative Ruling No. 6*, 2 P. C. R. 386.

29. (a) For form of power of attorney giving authority to an individual to file tariffs and schedules, see 2 P. C. R. 94. Rule 7.

(b) A schedule of rates published in the manner provided by law speaks with equal authority to the shipper and the carrier, and both are equally chargeable with notice of the rate and the route over which the

commission may limit and restrict the number and character of such tariffs and schedules, and the number of offices or stations at which the same are required to be posted, as aforesaid.<sup>30</sup>

(e). Where any public service company jointly acts or participates or connects with any other public service company in the performance of any service, to make<sup>31</sup> and file with the commission, when so required by it, and post and publish as hereinbefore provided, the tariffs or schedules of the joint rates, prices, charges, fares, or tolls adopted or in force between them (including, when directed, the rules and regulations, contracts and practices, affecting or relating to the same), which must be just and reasonable, and not more in the aggregate, nor in the apportionment thereof between said companies, than may be prescribed by any order of the commission:—

Provided, however, That the tariffs or schedules of such joint rates, prices, charges, fare, or tolls need only be filed by one of the said public service companies; and the other company or companies, with the \*consent and approval of the commission, need only file such evidence of concurrence therein or acceptance thereof as may be required by the Commission:<sup>32</sup> Provided, That whenever any public service company shall file any tariffs or schedules under the provisions of this act, or shall participate in any such tariff or schedule so filed, the rates, fares, and charges, and the rules, regulations and practices, therein contained, as against such public service company, its officers, agents, and employees, shall be deemed to be the legal rate,<sup>33</sup> fare, or

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rate is applicable. *Central of Ga. Ry. v. Curtis (Ga.)*, 82 S. E. 318; *Virginia-Carolina Peanut Co. v. Atl. C. L. R. Co. (N. Car.)*, 82 S. E. 1.

30. See Rules of Practice and Procedure, Rule 31, 2 P. C. R. 22.

31. *Adrian Furnace Co. v. P. R. R. Co.*, 2 P. C. R. 632.

32. Regulations governing the granting of power of attorney and issuing of concurrence in tariffs of rates and fares of common carriers and express companies, with forms. *Tariff Circular, No. 1*, 2 P. C. R. 91-98.

33. (a) *Wichita Falls & W. Ry. Co. v. Asher (Tex.)*, 171 S. W. 1114.

(b) It is the company's duty to enforce its schedule of rates as filed with the Commission. *Mehard v. New Wilmington W. S. Co.*, 2 P. C. R. 272.

(c) Rates filed are the only rates which can be collected. It matters not that an error was made by the carrier's agent in quoting the rate.

charge, and the rules, regulations, and practices; otherwise, the published rate, rules, regulations, and practices, if any, shall be the legal rate, fare or charge, rules, regulations and practices.

(f). To make no change in any tariff or schedule, which shall have been filed or published or posted by any public service company in compliance with the preceding sections, except after thirty days' notice to the commission and to the public, posted and published in the manner, form, and places required with respect to the original tariffs or schedules, which shall plainly state the exact changes proposed to be made in the tariffs or schedules then in force,<sup>34</sup> and whether an increase or decrease, and the time when the proposed changes will go into effect; and all such changes shall be shown by filing, posting, and publishing new tariffs or schedules, or shall be plainly indicated upon the tariffs or schedules in force at the time, and kept open to the public inspection:<sup>35</sup> Provided, That the commission may, in its discretion and for good cause shown, allow changes in such tariffs or schedules upon less

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Shipper and carrier are both conclusively presumed to know what the rates are. *Aldrich v. Southern Ry. Co.*, 79 S. E. 316; *St. Louis, I. M. & S. R. Co. v. Faulkner*, 164 S. W. 763; *Ford v. Chi. R. I. & P. Ry. Co.*, 143 N. W. 249; *Central of Ga. Ry. Co. v. Birmingham S. & B. Co.*, 64 So. 202; *Central R. R. of N. J. v. Mauser, et al.*, 241 Pa. 603, 88 Atl. 791, 49 L. R. A. (N. S.), 92 and note; *Central of Ga. Ry. v. Curtis*, 82 S. E. 318; *J. H. Hamlen & Sons Co. v. Ill. Cent. R. Co.*, 212 Fed. 324. Mistake, inadvertence, honest agreement and good faith, are alike unavailing. *New York, N. H. & H. R. Co. v. York & Whitney Co.*, 102 N. E. 366, and cases there cited. And the carrier can recover the balance of a rate due, where a lower rate was quoted and paid by mistake. *L. & N. R. Co. v. Maxwell*, 237 U. S. 94, 59 L. Ed. —; *P. R. R. Co. v. Crutchfield*, 55 Pa. Super. 346; *P. & R. Ry. v. Baer*, 56 Pa. Super. 307; *Herminghausen v. Ad. Ex. Co. (Ia.)*, 149 N. W. 234.

(d) But where the rate filed violated the long and short haul clause of the Public Service Company Law, the Commission ordered a refund. *Birkle v. N. Y. Central & H. R. R. Co.*, 1 P. C. R. 71.

34. A tariff or schedule filed and posted must be allowed to become effective and remain in effect for at least 30 days before any change may be made therein, except for excursion rates issued under General Order No. 4 (q. v. 1 P. C. R. 67), *Conference Ruling No. 1*, 2 P. C. R. 100. Unless specific authority be granted by the Commission. *Administrative Ruling No. 5*, superseding *Conference Ruling No. 1*, 2 P. C. R. 287.

35. See "Amendments and Supplements," 1 P. C. R. 46.

than thirty days' notice herein specified, or upon other conditions:<sup>36</sup> And provided, further, That no rate, practice, or classification which shall have been determined by the Commission shall be changed or discontinued by the public service company, directly or through any change in classifications, rules, regulations, contracts, or practices, within a period of three years after such determination, without application to and the approval of the commission, of which application thirty days' prior notice shall be given in the said tariffs or schedules to the public: And provided further, That it shall be the duty of every public service company, when required by the commission, to issue to its shippers, consumers, or other patrons a certificate or other evidence of payments made by them to it in excess of the prior established rate, of an increase in which rate notice has been given to the commission and the public as aforesaid.

(g). To file with the commission, when required by it, verified copies of any and all contracts, writings, agreements, leases, ar- [\*1380] rangements, or other en\*agements entered into by such public service company with any person, corporation, municipal corporation, any state government, the Federal government, or any branch or subdivision thereof, or other public service company, in relation to its public service.

(h). To make and file, when and in the manner and form required by the commission, any and all reports to the commission, which shall contain such facts, accounts, and information as may be prescribed by the commission; and, generally, to furnish

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36. (a) See Rules of Practice and Procedure, Rule 32, 2 P. C. R. 22.

(b) See General Order No. 4, regulating notice of change in tariffs and schedules in the matter of fares for excursions limited to certain designated periods. 1 P. C. R. 67.

(c) See General Order No. 7, in the matter of application of rates at intermediate points. 1 P. C. R. 121, and amendment thereto, 1 P. C. R. 183.

(d) See General Order No. 9, in the matter of issuing rates on less than statutory notice. 1 P. C. R. 181.

(e) In the matter of the sale of commutation and term tickets before the date of the initial trip. Administrative Ruling No. 7, 2 P. C. R. 650.

(f) In the matter of establishing rates and fares on newly constructed lines. Tariff Circular No. 2, 2 P. C. R. 98.

any and all information required by the commission in the performance of its duties under this act.<sup>37</sup>

(i). To adopt, use and keep, in conducting its business, such form, method, system, or systems, of accounts, records, and memoranda as shall be prescribed by the commission<sup>38</sup>; to carry no charges in any operating account which should properly be charged to the capital account, or vice versa<sup>39</sup>; to carry a proper and reasonable depreciation account, if required so to do by order of the commission; and to obey and abide by all the regulations and orders of the commission concerning such accounts, records, and memoranda, and the keeping of the same: Provided, That this subsection shall also apply to all municipal corporations, with respect to the accounts, records, and memoranda relating to the rendering or furnishing by them to the public of any service of the kind or character rendered or furnished by public service companies, and to the making of reports in relation thereto: And provided further, That all corporations and persons, operating under lease or other contract any such plant or other facilities, owned by such municipal corporation, shall adopt, use, and keep, in respect to such operation of such plant or other facilities under such lease or contract, such form or system of accounts as shall be adapted to and reasonable under the circumstances, and consistent with the obligations of such lease or contract, or of any contract made in pursuance thereof, and shall conform to such orders as the commission, on hearing, may make in respect to such form or system of accounts, and shall make such reports in relation thereto as may be required by the commission.

(j). To keep all books, accounts, papers, records, and memoranda, as shall be required by the commission, in an office within

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37. In the matter of discontinuance of reporting inspections of locomotive boilers. 1 P. C. R. 48. See Reports of Accidents, 1 P. C. R. 72.

38. Where the books of a company were poorly kept, it was required to revise its system, under instructions from the Commission's Bureau of Accounts and Statistics, and submit a copy of its balance sheet to the Commission annually for two years. *Mehard v. New Wilmington W. S. Co.*, 2 P. C. R. 272.

39. As to classification of property abandonments under the uniform accounting rules of the Interstate Commerce Commission, see *Kansas Cy. S. R. Co. v. United States*, 231 U. S. 423, 58 L. Ed. 296, 1 P. C. R. 102.

this Commonwealth, and not to remove the same or any of them from the Commonwealth except upon such terms and conditions as may be prescribed by the commission; but the provisions of this paragraph shall not apply to a public service company of another state, engaged in interstate commerce, whose accounts are [\*1381] kept at its principal place \*of business without the state, in the manner prescribed by the Interstate Commerce Commission: Provided, That such public service company, when required by the commission, shall furnish to the commission, within such reasonable time as it shall prescribe, certified copies of its books, accounts, papers, records, and memoranda relating to the business done by such public service company within this Commonwealth.

(k). To furnish to the commission, from time to time, and as the commission may require, all maps, profiles, reports of engineers, books, papers, records, and other documents or memoranda, or copies of any and all of them, in aid of any inspection, examination, inquiry, investigation, or hearing, or in aid of any determination of the value of its property, or any portion thereof; and to co-operate with the Commission in the work of the valuation of its property, or any portion thereof; and to furnish any and all other information to the Commission, as the Commission may require, in any inspection, examination, inquiry, investigation, hearing, or determination of such valuation of its property and facilities.<sup>40</sup>

(l). To account or report to the Commission, when required by it so to do, for the disposition and application of the proceeds of all sales or pledges of all stocks, trust certificates, bonds, notes, and other evidences of indebtedness, and other securities; which accounts and reports shall be made in such form and detail, verified by affidavit of the proper officer or officers of such company having knowledge thereof as to the Commission may seem advisable; and, in accordance with reasonable rules and regulations which may be adopted by the Commission, to use and apply the proceeds thereof to the purpose or purposes certified to the Commission, under the provisions of this act, and to no other purpose or purposes whatsoever.

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40. *Mehard v. New Wilmington W. S. Co.*, 2 P. C. R. 272.



(m). If a railroad corporation or street railway corporation, or other common carrier, to furnish a reasonably sufficient number of safe<sup>41</sup> trains, cars, vehicles, boats, or other facilities; and to run and operate the same with such motive power as may reasonably be required, in the conveyance of all such passengers or property as may seek, or be offered to it, for such conveyance; and to run and operate its said trains, cars, vehicles, boats, or other facilities with sufficient frequency, at such reasonable and proper times, and to and from such stations or points, as the Commission, having regard to the general convenience and safety of the public, may require;<sup>42</sup> and, when reasonably required by the Commission, to change the time schedule for the running and operation of its trains, cars, vehicles, boats, or other facilities; [\*1382] and, \*generally, make any other arrangements and improvements in its service which the Commission may lawfully and reasonably<sup>43</sup> determine and require.<sup>44</sup>

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41. A carrier cannot relieve itself of this duty by agreement that the shipper shall inspect the cars and report if they are not safe. *Gulf, C. & S. F. Ry. Co. v. Boger* (Tex.), 169 S. W. 1093.

42. (a) Where additional train service would involve a net loss of \$25.00 per day, the Commission will not order the installation of such service. *Miners &c. v. P. & R. Ry. Co.*, 1 P. C. R. 99, Supplemental Order, 2 P. C. R. 126. But the fact that additional expense is involved is not necessarily a controlling consideration. *State v. Pub. Ser. Com.* (Wash.), 142 Pac. 165.

(b) Interstate trains may be required to render an adequate local service. *State ex rel. G. N. Ry. Co. v. Pub. Ser. Com.*, 142 Pac. 684; *Gulf, C. & S. F. Ry. Co. v. State* (Tex.), 169 S. W. 385.

(c) A railroad company cannot discontinue service because its operations are unprofitable, unless it has surrendered its charter and the same has been accepted by the state. *Brandt v. Leas*, 2 P. C. R. 419; *Town of Gassoway v. Gassoway Gas Co.* (W. Va.), 83 S. E. 189; *Chesapeake & O. Ry. Co. v. Pub. Ser. Com.* (W. Va.), 83 S. E. 286. But circumstances may justify the abandonment of a line of railroad. *State v. Old Colony Trust Co.*, 215 Fed. 307.

43. An order of a commission forbidding a railroad to sidetrack a local train to permit passage of an express, is unreasonable, where it is shown that the local was never delayed more than 10 minutes, while the express, if not allowed a clear track, will be delayed more than 30 minutes. *N. C. Ry. Co. v. Laird* (Md.), 91 Atl. 768.

44. Additional train service will not be ordered in the absence of evi-

(n). If a railroad corporation or other common carrier, engaged in the transportation of freight or property, to furnish, upon reasonable request, to all persons and corporations who may apply therefor, and offer freight or property for transportation, sufficient and suitable<sup>45</sup> cars, vehicles, boats, motive power, or other facilities, as may be reasonably required for the transportation of such freight or property; or, in case at any particular time it may not have sufficient cars, boats, vehicles, motive power, or other facilities to meet the requirements for the transportation of property, then lawfully to distribute all available cars, vehicles, boats, motive power, or other facilities among the several applicants therefor, without discrimination between shippers, localities, or competitive or non-competitive points,<sup>46</sup> in accordance with the rule of distribution of the Interstate Commerce Commission. But preferences may always be given in the supply of cars, boats, vehicles, motive power, or other facilities for shipment of livestock or perishable matter.

(o). If a railroad corporation, upon application of any owner or operator of any lateral railroad, or any private side track, or of any shipper, tendering property or traffic for transportation, or of any consignee, to construct, maintain, and operate, at a reasonable place and upon reasonable terms, a switch connection with any such lateral railroad or private side track which may be constructed to connect with its railroad, where such connection may be reasonably practicable and can be put in with safety, and will furnish sufficient business to justify the construction and maintenance of the same:<sup>47</sup> Provided, That whenever any lateral line of railroad or private side track has been so connected with a line of any railroad, or whenever any owner of such lateral railroad,

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dence of a public demand for it. *Fiscus v. P. & R. Ry. Co.*, 2 P. C. R. 252.

45. See note 41 *supra*.

46. *Sonman S. Coal Co. v. P. R. R. Co.*, 241 Pa. 487; *Stineman Coal Mining Co. v. P. R. R. Co.*, 241 Pa. 509; *Puritan Coal Mining Co. v. P. R. R. Co.*, 237 Pa. 420, affirmed in 237 U. S. 121, 59 L. Ed. —; *Clark Bros. Coal Mining Co. v. P. R. R. Co.*, 241 Pa. 515, reversed in U. S. Adv. Ops. 1914, 896, 59 L. Ed. —.

47. As to constitutionality of such legislation, see *State v. Pub. Ser. Com.*, 137 Pac. 1057, and cases reviewed there.

or any private sidetrack has at any time heretofore sold or leased, or shall hereafter sell or lease, such lateral railroad or side track to any railroad corporation, any person or corporation shall be entitled to connect therewith, or to use the same, upon payment to the party incurring the primary expense thereof of a reasonable proportion of the cost of the said lateral railroad or private side track, and of the maintenance thereof; which shall be determined, in case of disagreement among the parties, by the Commission, after notice to the interested parties, and a hearing. Provided that [\*1383] such connection and use can be made without unreasonable interference with the use thereof by the party incurring the primary expense or owning or leasing said lateral railroad or side track.

(p). If a telephone or telegraph corporation, or person or persons engaged in like business, to cause the transmission of dispatches, messages, or communications by it to be reasonably continuous, and without unreasonable interruption or delay; and, if a common carrier, to cause the conveyance of passengers and property by it to be reasonably continuous, and without unreasonable interruptions or delay.

(q).<sup>48</sup> Whenever a common carrier<sup>49</sup> receives property<sup>50</sup> for

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**48. Carmack Amendment.** This subsection is an almost verbatim copy of the Carmack Amendment to the Hepburn Bill (Act of June 29, 1906, c. 3591, U. S. Comp. St. 1913, p. 3875, pars. 11 and 12), amending the Act to Regulate Commerce. The leading case in its interpretation is *Adams Ex. Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257 (annotated).

Before the Carmack Amendment, the initial carrier might, by contract, limit his liability to loss occurring on his own line. This entailed hardship upon the shipper, who was frequently unable to obtain evidence showing how or where the loss occurred. To relieve the shipper, presumptions and rules of evidence were applied by the courts in fastening responsibility when it was found impossible to show on which of several connecting lines the loss occurred, and, *prima facie*, that carrier was held liable in whose possession the goods were found in a damaged condition, although the shipper could maintain an action against any previous carrier whose negligence may have caused the loss. See note to *Manufacturing Co. v. Railway Co.*, 121 N. C. 514, 28 S. E. 474, 61 Am. St. Rep. 682.

The Carmack Amendment, and the rules of decision prevailing in the Federal courts with respect to its interpretation and application, supersede the laws, regulations, and policy of any state, so far as interstate ship-

transportation between points within this Commonwealth, it shall issue a receipt or bill of lading<sup>51</sup> therefor, and shall be liable<sup>52</sup> to

ments are concerned. *Adams Ex. Co. v. Croninger*, *supra*; *Robinson et al. v. L. & N. R. Co.* (Ky.), 169 S. W. 831; *Kansas Cy. & M. Ry. Co. v. Oakley* (Ark.), 170 S. W. 565; *Bailey v. Missouri Pac. Ry. Co.* (Mo.), 171 S. W. 44; *San Antonio & A. P. Ry. Co. v. Bracht* (Tex.), 172 S. W. 1116; *Armstrong v. Ill. Cent. R. Co.* (Ky.), 172 S. W. 947; *Hunt v. St. L. I. M. & S. Ry. Co.* (Mo.), 173 S. W. 61; *Thomas Bros. v. St. L. & S. F. R. Co.* (Mo.), 173 S. W. 96; *J. T. Rather & Co. v. Nash. C. & St. L. Ry. Co.* (Tenn.), 174 S. W. 1113; *Spada v. P. R. R. Co.* (N. J.), 92 Atl. 379; *Central of Ga. Ry. v. Curtis* (Ga.), 82 S. E. 318; *Charleston & Western Car. Ry. Co. v. Varnville Furniture Co.*, 237 U. S. 597, 59 L. Ed. —; *W. H. Mitchell & Co. v. Atl. C. L. R. Co.* (Ga.), 84 S. E. 227; *Ad. Ex. Co. v. Welborn* (Ind.), 108 N. E. 163. See also cases cited in *Public Service Company Law, Annotated*, 1914, 1 P. C. R., page 1383, note 45 (d).

But the Carmack Amendment does not govern intrastate shipments [except as its provisions are enacted in the statutes of the state—Ed.]. *Bast v. Platt*, 55 Pa. Super. 618. Nor shipments from a point in one state to a foreign country. *Best v. Gt. N. Ry. Co.* (Wis.), 150 N. W. 484; *Burke v. Gulf, C. & S. F. R. Co.*, 147 N. Y. Suppl. 794. Nor shipments between two points in the same state which pass through another state en route. *Wichita Falls & W. Ry. Co. v. Asher* (Tex.), 171 S. W. 1114.

49. Under the Interstate Commerce Act telegraph and telephone companies are "common carriers" and subject to the provisions of this section. *Bailey v. W. U. Tel. Co.* (Tex.), 171 S. W. 839. [But in Pennsylvania this provision is limited by the definition of "common carrier" in Art. I, Sec. 1, ante.—Ed.]

50. Baggage is "property" within the meaning of this section. *L. & N. R. Co. v. Miller*, 162 S. W. 73. Liability as a carrier does not extend to articles in a trunk which are not baggage. *Central of Ga. Ry. v. Courson* (Ala.), 65 So. 698. Razors, photographs, clothing, money, are baggage. *San Antonio & A. P. Ry. Co. v. Green* (Tex.), 170 S. W. 110. Quilts, feather pillows, ticking, pillow cases and sheets are not baggage. *Central of Ga. Ry. v. Courson* (Ala.), 65 So. 698.

51. A bill of lading is a receipt for the goods and a contract to carry. *Morrison Grain Co. v. Missouri Pac. Ry. Co.* (Mo.), 170 S. W. 404.

52. **Liability of Initial and Connecting Carriers.** (a) The initial carrier is liable for damages occurring on the lines of the connecting carriers. *Texas Midland R. R. v. Becker & Cola* (Tex.), 171 S. W. 1024; *Texas & Pac. Ry. Co. v. White* (Tex.), 174 S. W. 953. The connecting carriers become the agents of the initial carrier. *Fesser v. Chi. & I. M. Ry. Co.*, 267 Ill. 418, 108 N. E. 709; *Missouri K. & T. Ry. Co. v. Ward* (Tex.), 169 S. W. 1035.

the lawful holder<sup>53</sup> thereof for any loss, damage, or injury to said

(b) The initial carrier is not liable on a new and different contract made by the shipper with another carrier after the shipment has reached its original destination. *International Agr. Corp. v. So. Ry. Co. (Ala.)*, 66 So. 14.

(c) The liability attaches when the goods are delivered to the carrier for shipment, although the bill of lading is not executed until later. *Morrison Grain Co. v. Missouri Pac. Ry. Co. (Mo.)*, 170 S. W. 404.

(d) The carrier may not charge an "insurance fee" to cover its liability. *Swanson v. Northwestern Penna. Rys. Co.*, 1 P. S. C. Rep. 150; *Markham v. Same*, Id. 196.

(e) This liability is not enforced by complaint to the commission but by suit in court. *Chas. Dreifus Co. v. P. & R. Ry.*, 1 P. S. C. Rep. 189; *Pettis v. P. & R. Ry.*, 1 P. S. C. Rep. 191; *Mutual Film Corp. v. Adams Ex. Co.*, 1 P. S. C. Rep. 216.

(f) The duty of the initial carrier does not end by merely carrying the goods to their destination safely. Delivery to the person entitled to receive the same, or, if delivery cannot be made, then safe storage subject to the orders of the consignors, is a part of the contract of carriage. *Coovert v. Spokane, P. & S. Ry. Co.*, 141 Pac. 324.

(g) Where goods have been safely carried by the connecting line to their destination, the liability as a *carrier* has ceased and only a liability as warehouseman remains. The initial carrier is then not liable at all. *L. & N. R. Co. v. Brewer (Ala.)*, 62 So. 698; *Hogan Milling Co. v. Union Pac. R. Co.*, 139 Pac. 397. But to relieve from liability as a carrier it must be affirmatively shown that the goods reached destination safely. *San Antonio & A. P. Ry. Co. v. Green (Tex.)*, 170 S. W. 110.

(h) The consignee may, however, bring his action against the delivering carrier. *Duvall v. Louisiana Western R. Co.*, 65 So. 104; *Elliott v. Chi. M. & St. P. Ry. Co. (S. Dak.)*, 150 N. W. 777; *Eastover Mule & Horse Co. v. Atl. C. L. R. Co. (S. Car.)*, 83 S. E. 599. Or action may be brought jointly against all the carriers. *Atchison, T. & S. F. Ry. Co. v. Boyce (Tex.)*, 171 S. W. 1094.

53. (a) One who succeeds to the shipper's rights may recover upon proof of his right, even though he do not hold the bill of lading. *Bowden v. Phila. B. & W. R. Co. (Del.)*, 91 Atl. 209. But where a shipment is sent under bill of lading requiring surrender of the original before delivery to consignee, the initial carrier is liable to consignor for a delivery of the terminal carrier made on a mere written order. *Thomas v. Blair (Mich.)*, 151 N. W. 1041.

(b) A delivery to the named consignee without requiring the production of the bill of lading, is at the carrier's risk. *Coovert v. Spokane, P. & S. Ry. Co.*, 141 Pac. 324.

property<sup>44</sup> caused<sup>45</sup> by it or any other common carrier to which said property may be delivered, or over whose line or lines such property may pass. No contract, receipt, rule, or regulation shall exempt<sup>46</sup> such common carrier from the liability hereby imposed :

54. This includes the damage caused by delay in shipment. *Norfolk Truckers' Ex. v. Norfolk So. R. Co. (Va.)*, 82 S. E. 92. *Southern Pac. R. Co. v. A. J. Lyon & Co. (Miss.)*, 66 So. 209.

55. The act does not impose an absolute liability upon the initial carrier. The loss must be "caused" by the default, omission or commission of the initial carrier or its connection. *Burke v. Gulf, C. & S. F. Ry. Co.*, 147 N. Y. Suppl. 794.

56. A. Limitation of Liability. (a) To exempt from liability and to limit the amount of damages, are entirely different. To "exempt" means to release, discharge, waive, relieve from liability. To "limit" is to fix a point or boundary beyond which the subject cannot pass or extend. *Jones v. Wells-Fargo Ex. Co.*, 145 N. Y. Suppl. 601.

(b) Where a carrier, in accordance with its tariffs filed, offers to carry goods either under the terms of a bill of lading limiting its liability to the stated value of the goods or under a common carrier's liability at common law, and provides a lower rate for the former service, its liability is limited if the shipper elects to ship under the former service and takes advantage of the lower rate. *Zoller Hop Co. v. Southern Pac. Co. (Ore.)*, 143 Pac. 931; *Kansas Cy. & M. Ry. Co. v. Oakley (Ark.)*, 170 S. W. 565; *Thomas Bros. v. St. L. & S. F. R. Co. (Mo.)*, 173 S. W. 96; *J. T. Rather Co. v. Nashville, C. & St. L. Ry. Co. (Tenn.)*, 174 S. W. 1113; *Nashville, C. & St. L. Ry. Co. v. Truitt & Co. (Ga.)*, 82 S. E. 465; *Dodge v. Adams Ex. Co.*, 54 Pa. Super. 422; *Wright v. Adams Ex. Co.*, 54 Pa. Super. 485; *Hertz v. Adams Ex. Co.*, 55 Pa. Super. 378; *Heilman & Clark v. Chi. & N. W. Ry. (Ia.)*, 149 N. W. 436.

(c) A shipper is bound by notice of limited liability where the tariffs filed show two rates, one an unlimited liability rate and the other a limited liability rate. *Robinson v. Louisville & N. R. Co. (Ky.)*, 169 S. W. 831. And he is bound by such notice whether the rates filed be joint rates or a combination of local rates. *Id.*

(d) If only part of the shipment is injured the carrier cannot limit his liability to a proportional amount of the agreed valuation. *Central of Ga. Ry. v. Broda (Ala.)*, 67 So. 437.

(e) The fact that the agent had no authority to make an unlimited liability contract is immaterial. *Ad. Ex. Co. v. Welborn*, 108 N. E. 163.

(f) It matters not that the limited liability is grossly disproportionate to the real value. *Geo. N. Pierce Co. v. Wells-Fargo & Co.*, 236 U. S. 278, 59 L. Ed. —. Cf. *contra*, *Louisville & N. R. Co. v. Jones (Ala.)*, 67 So. 621.

(g) In interstate shipments the contract limiting liability must follow the form prescribed by the Interstate Commerce Commission. A mere stipulation in a bill of lading is not sufficient. *Central of Ga. Ry. v. Broda* (Ala.), 67 So. 437.

(h) The burden is on the carrier to show either that the rates were filed or, in the absence of that, that the contract was reasonable. *Ad. Ex. Co. v. Cook* (Ky.), 172 S. W. 1096.

(i) But there is no consideration for a limitation of liability where only one rate is offered the shipper. *Kansas Cy. & M. Ry. Co. v. Oakley* (Ark.), 170 S. W. 565.

(j) Where an initial carrier had a flat rate for all shipments over its line and had established no through rates with connecting carriers, but in a course of dealing with the connecting carrier, known to the shipper, prepaid the rate to destination, which rate was based upon a limitation of liability, **held**: the recovery was limited to the amount upon which the connecting carrier's rate was based. *Glenlyon Dye Works v. Interstate Ex. Co.* (R. I.), 91 Atl. 5.

(k) Where carrier and shipper contracted in ignorance of the fact that the maximum valuation under the rate charged had been raised in newly published tariffs, **held**: the shipper could recover at the higher maximum valuation. *Rankin v. Cin. N. O. & T. P. Ry. Co.* (Ky.), 173 S. W. 377.

(l) A stipulation that the liability should be measured by the value of the goods at the time and place of shipment, is valid. *Spada v. P. R. R.* (N. J.), 92 Atl. 379.

(m) Limitation of liability must rest upon a consideration. *International & G. N. Ry. Co. v. Rathblath* (Tex.), 167 S. W. 751.

(n) Where there is a wrongful conversion by the carrier the measure of damages is the full value of the goods. *Nashville, C. & St. L. Ry. Co. v. C. V. Truitt Co.* (Ga.), 82 S. E. 465.

(o) Provision in a bill of lading fixing the liability at the value as shown by the invoice, plus freight charges, is valid. *Denver & R. G. R. Co. v. Peterson Grocery Co.* (Col.), 147 Pac. 663.

(k) Provisions of a contract limiting liability for damage to baggage to \$100 must be called to the traveler's attention. Printing on the ticket in small type is insufficient. *Beaham v. N. Y. C. & H. R. R. Co.* (Mo.), 174 S. W. 150.

(q) A stipulation in a bill of lading that the carrier shall not haul on any particular train or in time for any particular market, or otherwise than with reasonable dispatch, is valid if not interpreted to relieve the carrier from transporting with reasonable promptness. *Hunt v. St. L., I. M. & S. Ry. Co.* (Mo.), 173 S. W. 61.

**B. Contracts Requiring Notice of Loss.** (a) A stipulation requiring notice of loss is in the nature of a reasonable regulation and not a restriction of liability. It need not be supported by a special consideration such as a reduced rate. *Dunlap v. Chi. & A. Ry. Co.* (Mo.), 172 S. W. 1178.

Provided, That nothing in this section shall deprive any lawful holder of such receipt or bill of lading of any remedy or right of action which he has under existing laws: And provided further, That any common carrier issuing such receipt or bill of lading, shall, in the event of a recovery of a judgment against, or of a satisfaction made by, such carrier, for such loss or damage, be entitled to recover<sup>57</sup> from the common carrier on whose line the loss or damage shall have been sustained, an amount not in excess of the loss or damage to said property which the lawful holder of said bill of lading or receipt would otherwise have been entitled to recover against such last-mentioned carrier, and not in excess of the amount actually paid to the holder of such receipt or bill of lading.<sup>58</sup>

(b) Stipulation requiring notice of claim for damage to live stock to be given within one day of arrival at destination and before the stock is mingled with other stock, is valid. *Riddler v. Missouri Pac. Ry. Co.* (Mo.), 171 S. W. 632; *St. L. Southwestern Ry. Co. v. Burnett* (Ark.), 174 S. W. 1165; *Duvall v. Norfolk-Southern Ry. Co.* (N. Car.), 83 S. E. 21. Stipulation requiring notice within four months, is valid. *Bailey v. Missouri Pac. Ry. Co.* (Mo.), 171 S. W. 44; *San Antonio & A. P. Ry. Co. v. Bracht* (Tex.), 172 S. W. 1116; *Potter v. Kansas Cy. S. R. Co.* (Mo.), 172 S. W. 1153; *Forney v. Seaboard A. L. Ry.* (N. Car.), 83 S. E. 686; *A. C. Cheney P. Co. v. N. Y. C. & H. R. R. Co.*, 148 N. Y. Suppl. 108; *Davenport v. C. & O. Ry. Co.*, 149 N. Y. Suppl. 865. Thirty days' notice is reasonable. *Henry v. Chicago M. & P. S. Ry.* (Wash.), 147 Pa. 425. Ten days' notice is reasonable. *W. H. Mitchell & Co. v. Atl. C. L. R. Co.* (Ga.), 84 S. E. 227; *Armstrong v. Ill. Cent. R. Co.* (Ky.), 172 S. W. 947; *Spada v. P. R. R.* (N. J.), 92 Atl. 379. Contra. *Ill. Cent. R. Co. v. Avery & Son* (Ala.), 67 So. 414. Five days' notice is reasonable. *Dunlap v. Chi. & A. Ry. Co.* (Mo.), 172 S. W. 1178.

(c) A provision that no claim shall be valid unless made in writing, verified by affidavit, and filed within 10 days, is valid; but, being for the benefit of the carrier, it may be waived by him. *Howard & Callahan v. Ill. Cent. R. Co.* (Ky.), 171 S. W. 442; *Sauls-Baker Co. v. Atl. C. L. R. Co.* (S. Car.), 82 S. E. 418. No consideration is necessary to support the waiver. *A. C. Cheney P. Co. v. N. Y. C. & H. R. R. Co.*, 148 N. Y. Suppl. 108.

57. The initial carrier is liable even though the connecting carrier on whose line the injury occurred is insolvent. *Tex. Mex. Ry. Co. v. King* (Tex.), 174 S. W. 336.

58. The Carmack Amendment to the Interstate Commerce Act (U. S. Comp. St. 1913, p. 3875, pars. 11 and 12) did not abrogate the rule of evidence that property received in good order by the carrier is presumed



(r). If a street railway corporation or incline plane corporation, whenever the Commission shall deem necessary or proper for the accommodation, convenience, or safety of the public in the conveyance of passengers, to transfer such passengers to or from another part of the system of the said street railway corporation or incline plane corporation;<sup>59</sup> and, to this end and object, shall make proper and convenient arrangement or adjustment of the time schedules of the said street railway corporation or incline plane corporation; and shall also make such proper and convenient arrangement or adjustment of its time schedules with those of other, contiguous, or connecting street railway corporations or incline plane corporations, as to the Commission shall seem necessary or proper for the accommodation, convenience, or safety of the public.

[\*1384] \*(s).<sup>60</sup> If a railroad corporation or a street railway corporation, to construct and maintain, whenever the Commission may require the same,<sup>61</sup> such switch or other connections with or between the lines of other companies of the same character, where the same is reasonably practical and can readily be connected, to form a continuous line of transportation, and to cause the conveyance of persons and property between points within this Commonwealth to be without unreasonable interruption or delay; and to establish through routes and service therein, and just and reasonable joint rates, fares, and charges applicable thereto;<sup>62</sup> and, where practicable, transport freight over the same without trans-

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to have been received in like good order by the succeeding carrier, and that final delivery in bad order raises a rebuttable presumption that the injury occurred on the delivering carrier's line. *Chi. R. I. & P. Ry. Co. v. Harrington* (Okla.), 143 Pac. 325; *Duvall v. L. W. R. Co.* (La.), 65 So. 104; *Glassman v. Chi. R. I. & P. Ry. Co.* (Ia.), 147 N. W. 757; *Eastover Mule & Horse Co. v. Atl. C. L. R. Co.* (S. Car.), 83 S. E 599.

59. *27th Ward Progressive Club v. Pittsburgh Rys. Co.*, 2 P. C. R. 585.

60. Congress has not taken over the whole subject of terminals, team tracks, switching tracks, sidings, etc., so as to exclude regulation of interchange traffic by state commissions. *Grand Trunk R. Co. v. Michigan R. R. Co.*, 231 U. S. 457, 58 L. Ed. 310, 34 Sup. Ct. 152.

61. Rules of Florida Railroad Commission regulating switching rates and practices construed. *State v. L. & N. R. Co.* (Fla.), 67 So. 875.

62. *Lehigh Fire Brick Works v. P. R. R. Co.*, et al., 2 P. C. R. 625.

fer from the originating cars; and shall not discriminate<sup>63</sup> in the said rates, fares, charges, or in any rules or regulations applicable thereto, between any such connecting lines: Provided, That no railroad corporation or street railway corporation shall be required to give the use of its tracks or terminal facilities to any other common carrier.<sup>64</sup> And provided, That this section shall not apply to a street railway corporation engaged in the business of carrying passengers, but not engaged in the general business of transporting freight, and which does not generally solicit the transportation of freight as a main branch of its business.

(t). To obey and abide by all lawful orders and regulations of the Commission, made under the provisions of this act, regulating the manner in which the tracks or other facilities of any railroad corporation, street railway corporation, or any other public service company, may be constructed across the tracks or other facilities of any other railroad corporation, street railway corporation, or any other public service company, at grade, or above or below

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63. (a) As to discrimination, see Art. III, Sec. 8, (a) and (b) and notes.

(b) The practice of requiring prepayment of freight by one connecting carrier and not by another, is discriminatory. *Wadley Southern R. Co. v. Georgia*, 137 Ga. 497, 73 S. E. 741, affirmed in 235 U. S. 651, 59 L. Ed. —, and cases there cited.

64. (a) In a large city covering twenty-two miles, where, in addition to its depots, a railroad has established a number of public team tracks and industrial sidings to relieve the congestion of freight at its depots, the transportation of freight begins at said team tracks and sidings, and an order of a state railroad commission requiring freight to be accepted there for delivery to a connecting carrier at a junction within the corporate limits of the city does not "give the use of its tracks or terminal facilities" to the other carrier. *Grand Trunk R. Co. v. Michigan R. R. Co.*, 231 U. S. 457, 34 Sup. Ct. 152, 58 L. Ed. 310; *Vandalia R. Co. v. Pub. Serv. Co. (Ind.)*, 106 N. E. 371; *Chi., M. & St. P. Ry. Co. v. State Pub. Ut. Co.*, 267 Ill. 544, 108 N. E. 737.

(b) Where, upon complaint that defendant carrier discriminated against complainant by refusing an interchange of traffic in its yards and terminals while allowing such interchange with other carriers, the commission ordered defendant to cease such discrimination, held: the order did not require defendant to give the use of its terminals to another carrier. *Pennsylvania Co. v. U. S.*, 236 U. S. 351, 59 L. Ed. —, affirming 214 Fed. 445; *Louisville & N. R. Co. v. United States*, U. S. Adv. Ops. 1914, 696, 59 L. Ed. —, affirming 216 Fed. 672.

grade, or at any prescribed level;<sup>65</sup> or in which the tracks or other facilities of any railroad corporation or street railway corporation may be constructed across any public highway at grade, or above or below grade; or in which any public highway may be constructed across the tracks or other facilities of any railroad corporation or street railway corporation at grade, or above or below grade; or regulating the manner in which such crossings shall be operated, maintained, and protected, including the stationing of watchmen thereat; installation and regulation of lights, blocks, or other system of signalling, safety appliances, devices or such other means or instrumentalities as the commission may prescribe;<sup>66</sup> as well as to obey and abide by all lawful orders and regulations of the Commission, made under the provisions of this act, requiring the alteration, relocation, removal, or abolition of any [\*1385] \*such crossings,—to the end, intent, and purpose that accidents may be prevented;<sup>67</sup> and also to bear and pay the expenses, damages, or compensation incident thereto, either severally or in such proportions as the Commission may determine under the provisions of this act.<sup>68</sup>

(u). If a telegraph corporation, or person engaged in the public telegraph business, to connect, whenever the Commission may require it or him so to do, its or his lines of telegraph with the

65. For procedure to be followed to secure approval of crossing of facilities, see *General Order No. 11*, 2 P. C. R. 102, and *Administrative Ruling No. 8*, to be reported in the early pages of Vol. 3, P. C. R.

66. In the matter of regulations governing the protection of grade crossings, see *General Order No. 5*, 1 P. C. R. 67.

67. (a) The Commission will modify plans for constructing crossings and will specify appliances to be used, when necessary for the public safety. *Application of Gaffney & James Cy. R. R. Co.*, 2 P. C. R. 112.

(b) Where the proposed extension of a street railway line crossed the tracks of a protesting company on the crest of an elevation toward and from which the cars of the protesting company must ascend and descend, the Commission approved the crossing but ordered that the cars operating on the extension should be brought to a full stop before crossing the tracks of the protestant. *Petition of Phoenixville, &c., Ry. Co.*, 2 P. C. R. 191.

68. *Borough of Butler's Petition*, 2 P. C. R. 65; *Wilkes-Barre v. L. V. R. R. Co.*, Id. 278; *Application of Wilkes-Barre Connecting R. R.*, Id. 470; *In re Grade Crossings, &c.*, Id. 593; *In re Abolition of Crossings, &c.*, 2 P. C. R. 730.

lines of any other such telegraph corporation, or person engaged in the public telegraph business; and thereupon it shall be and become the reciprocal duty of each of such connecting telegraph corporations, or persons, upon the payment of the usual charges to individuals for transmitting dispatches, as established by the rates and regulations of such telegraph corporations, or persons, or by the Commission as hereinafter provided, to receive and to transmit dispatches from and for each other with impartiality and good faith, and likewise for any individual or individuals.

(v). If a telephone corporation, or person engaged in the telephone business, whose lines, together with the lines of another telephone corporation, or person engaged in the telephone business, form a continuous line of communication between different localities, which are not reached by lines, facilities, or connections of either alone, and could be made to do so by the construction and maintenance of suitable connections between the several lines at common points, for the transmission of conversations between different localities, to jointly arrange for the interchange and transfer of conversations at such common points when it can reasonably be done, and efficient service can be obtained without injustice to either company and without substantial impairment or detriment to the service to be rendered by either company, and when necessity exists therefor, in order to supply through traffic communication between different localities not otherwise provided for by the companies in question, or either of them; and shall operate and conduct a joint through traffic over the several lines so connected, and shall make the proper rules and regulations governing the same, and shall establish just and reasonable rates and charges for the joint through service thereby rendered, and shall make among themselves an equitable apportionment of the costs and revenues appertaining to the joint facilities and service.<sup>69</sup>

(w). If a gas corporation, water corporation, or other public service company, furnishing its service or product upon meter or [\*1386] other similar measurement, or \*electric corporation, to provide, and keep in and upon its premises, suitable and proper apparatus, to be approved from time to time and stamped or

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69. As to the power of the Commission to compel telephone companies to make connections, see Art. V, Sec. 9, and notes thereto.

marked by the Commission, for testing and proving the accuracy of gas, water, electric, or other meters furnished by it for use; and by which apparatus every meter may be tested, upon the written request of the consumer to whom the same shall be furnished, and in his presence if he shall so desire. If the meter so tested shall be found to be accurate, within such commercially reasonable limits as the Commission may, by general or special order, fix for such meters, or class of meters, a reasonable fee, to be fixed by the Commission by standing order, sufficient to cover the cost of such test, shall be paid by the consumer requiring such test; but, if not so found, then the cost thereof shall be borne by the public service company furnishing said meter.<sup>70</sup>

(x). To give immediate notice to said Commission of the happening of any accident in or about, or in connection with the operation of its property, facilities, or service, wherein any person shall have been killed or injured, and to furnish such full and detailed report of such accident, within such time and in such manner as the Commission shall, by general rule or special order, or otherwise, require. Such report shall not be open for public inspection, except by order of the Commission, and shall not be admitted in evidence for any purpose in any suit or action for damages growing out of any matter or thing mentioned in said report.<sup>71</sup>

(y). To observe and obey all and singular the lawful orders and regulations which may be issued or made by the Commission in the exercise of the powers conferred upon it by this act.<sup>72</sup>

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70. See Rules and Regulations governing electric, gas, water and heating service. 1 P. C. R. 153-178.

71. See Reports of Accidents. 1 P. C. R. 72.

72. (a) See list of General Orders, Administrative Rulings, Conference Rulings, and Tariff Circulars in front of this volume. See Rules of Practice and Procedure, 2 P. C. R. 1-31. See Rules and Regulations governing electric gas, water and heating service, 1 P. C. R. 160-178. See Rules and Regulations governing form of Tariffs and Schedules, 1 P. C. R. 44-46.

(b) See Rules of Practice and Procedure, Rule 39. 2 P. C. R. 30.

(c) See Art. V, Secs. 1, 2, 3; Art. VI, Secs. 22, 23, 24.

(d) When a corporation acquires a franchise for the purpose of carrying on a corporate business within a state, it is subject to the police power,

## ARTICLE III.

## Creation, Powers and Limitation of Powers, of Public Service Companies.

Section 1. It shall be lawful for every public service company—

(a). To demand, collect, and receive fair, just, and reasonable prices, rates, fares, tolls, charges, or other compensation for each and every service rendered or to be rendered by it to any person or corporation, or to any other public service company with whom it interchanges facilities and services.<sup>73</sup>

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and the state may regulate the manner of the exercise of the franchise. *Idaho Power & Light Co. v. Blomquist* (Idaho), 141 Pac. 1083, 1088.

73. (a) See Art. III, Sec. 8 (a) and (b); Art. V, Secs. 3, 4.

**A. CONSIDERATIONS AFFECTING REASONABLENESS OF RATES. I. In General.** (a) Where rates on anthracite coal have remained the same for over seventeen years, the presumption is against the propriety of continuing these rates. This presumption does not go to the extent of indicating that they ought to be raised or lowered, but only that they ought to be revised and changed so as to meet present conditions. *Philadelphia v. P. & R. Ry. Co.*, 2 P. C. R. 313. Cf. *Louisville & N. R. Co. v. U. S.*, U. S. Adv. Ops. 1914, 696, 59 L. Ed. —.

(b) The fact that water rates are lower in a large community nearby does not prove that the higher rates charged in a small community, where the conditions are different, are unreasonable. *Ernst v. Glenside Water Co.*, 2 P. C. R. 119.

(c) Local conditions such as size of cars, frequency of service, density of population of adjacent territory, the grades and general alignment of the road-bed and the annual outlay for repairs and up-keep, must always be considered in prescribing rates for a transportation company. *Sassaman v. Lehigh Valley Transit Co.*, 2 P. C. R. 80.

(d) The state cannot compel a carrier to maintain a rate on a particular commodity that is less than reasonable, in order to build up a local enterprise, even though the return from the entire intrastate business is adequate. *Northern P. R. Co. v. N. Dak.* (N. Dak. Coal Rates Case), 236 U. S. 585, 59 L. Ed. —, reversing 145 N. W. 135.

(e) Where the rates of an electric company yield a fair return on all its business, an increase in its power rates will not be allowed where this item is not separated from the rest of the business and the return upon it clearly shown to be unremunerative. *Elliott v. Big Spring Elec. Co.*, 2 P. C. R. 709.

**II. Adequate Return on Investment.** (a) A company should be allowed a return of at least 6 per cent. *Borough of Mt. Union v. Mt.*

**Union Water Co.**, 2 P. C. R. 698; **Matheson v. Middletown & S. C. Water Co.**, 1 P. C. R. 187; **Brymer v. Butler Water Co.**, 179 Pa. 231; **P. R. R. v. Phila. County**, 220 Pa. 100; **Des Moines Gas Co. v. Des Moines**, U. S. Adv. Ops. 1914, 811, 59 L. Ed.—. A return of 4½% is not unreasonably high. **Borough of Mechanicsburg v. Mechanicsburg G. & W. Co.**, 246 Pa. 232, 92 Atl. 142.

(b) A rate of 12c per k. w. h. for electric service for domestic and commercial purposes is not unreasonable where it appears that the company is receiving but 5% on its investment in the locality where the rate is charged; and this is true although the company charges only 3c per k. w. h. in another locality where it has a valuable investment and must meet formidable competition. **Lewistown v. Penn Central L. & P. Co.**, 2 P. C. R. 249.

(c) A complaint alleging excessive rates was dismissed where it appeared that the respondent bridge company, in twenty-three years of operation, had not earned 3% on the value of its property devoted to public use, had paid no dividends, and was charging a rate lower than that allowed by statute. **Baldrige v. McKeesport & Duquesne Bridge Co.**, 2 P. C. R. 79.

(d) Rates not in excess of those allowed by statute and which do not return more than 2% on the investment, are not unreasonable. **Zook v. Turnpike Co.**, 2 P. C. R. 194.

(e) The Commission cannot compel a railroad to operate its passenger business at a loss and to recoup by an increase in freight rates. The railroad is entitled to earn a fair profit on every branch of its business, subject to the limitation that its corporate duties must be performed even though at a loss. **Combined Committee, &c. v. P. R. R. et al.**, 2 P. C. R. 390, Supplemental Opinion, Id. 717, Rehearing denied, 728.

(f) If existing rates on freight do not afford a fair return on the investment of the railroads, the remedy should be a general advance in such manner as to equalize the burdens and to affect alike all interests and subjects of traffic. Unequal burdens on certain localities or commodities ought not to be tolerated. **Philadelphia, &c., v. P. & R. Ry. Co. et al.**, 2 P. C. R. 313.

III. Valuation. (a) See Art. V, Sec. 20 (a), (b) and (c).

(b) In determining the reasonableness of rates prescribed for the carriage of one commodity, and where the conclusions are based on cost, the entire cost must be included. The outlays that exclusively pertain to that commodity must be assigned to it, but other expenses must be fairly apportioned, so that the commodity shall support its share of the overhead expenses. **Northern P. R. Co. v. N. Dak.** (N. Dak. Coal Rates Case), 236 U. S. 585, 59 L. Ed. reversing 145 N. W. 135.

IV. Effect of Contracts Fixing Rates. (a) Where a contract between a municipality and a water company fixing rates is for an indeterminate and uncertain time, the company is not bound to maintain the

schedule of rates therein. *Borough of Mt. Union v. Mt. Union Water Co.*, 2 P. C. R. 698; *Borough of Bellevue v. Ohio Valley Water Co.*, 1 P. C. R. 128, affirmed in 245 Pa. 114; *Turtle Creek Boro. v. Penna. Water Co.*, 243 Pa. 415.

(b) Contracts between subscribers and public service companies for fixed periods are impracticable, if not impossible, from their very nature. The service is a public service, and subject to a constant change of conditions. *Wolverton v. Mountain States Tel. & Tel. Co. (Colo.)*, 142 Pac. 165.

#### **B. PARTICULAR RATES PASSED UPON. I. Miscellaneous.**

In the operation of an inclined plane a higher rate for an "up" than a "down" trip is lawful and reasonable. *Geer v. Inclined Plane Co.*, 2 P. C. R. 455. A higher rate of toll for automobiles than for horse drawn vehicles, is reasonable. *Zook v. Turnpike Co.*, 2 P. C. R. 194. In re rates on pulp wood. *W. Va. Pulp & Paper Co. v. P. R. R. Co.*, 2 P. C. R. 673. In re rates for joint exchange and toll service. *Norwich Tel. Co. v. Bell Tel. Co.*, 2 P. C. R. 466. A minimum monthly charge of \$1.00 for electric service is reasonable. *Cauffiel v. Citizens L., H. & P. Co.*, 2 P. C. R. 189. A rate of 12c per k. w. h. for electric service for domestic purposes in one locality may be reasonable, even though the same company charge only 3c in another locality where it is compelled to meet competition. *Lewistown v. Penn Central L. & P. Co.*, 2 P. C. R. 249. A passenger rate of 2c per mile is confiscatory. *Bellamy v. Missouri & N. A. R. Co.*, 215 Fed. 18; *Norfolk & Western Ry. Co. v. Conley*, 236 U. S. 605, 59 L. Ed. —. A passenger rate of 10c for a three and one-half mile haul where the traffic is of a suburban character, is unreasonable. *Jones v. D., L. & W. R. R. Co.*, 2 P. C. R. 461. A joint rate 10c higher on cement than a one line haul of the same distance, is reasonable. *Dexter Portland Cement Co. v. L. V. R. R. Co.*, 2 P. C. R. 447. A charge of 10c per package for returning a receipt signed by consignee, is reasonable. But no such charge may be made for "insurance." *Swanson v. Northwestern Pa. Ry.*, 1 P. S. C. Rep. 150, *Markham v. Same*, Id. 196.

**II. Demurrage Charges.** (a) Demurrage is a charge in the nature of a penalty for the unreasonable detention of cars which belong to the carrier or are in the service of the carrier under the terms of an agreement with the owner, either express or implied, and its purpose is to secure the prompt return of the cars. *Pittsburgh Plate Glass Co. v. P. R. R. Co.*, 2 P. C. R. 530 and 695.

(b) Where private cars are exclusively used for hauling the owner's coal from his own mine to his own plant, demurrage may not, in the absence of an agreement which expressly or impliedly puts the cars in the service of the carrier, be charged while the said cars stand loaded upon the owner's own tracks. Id.



To establish a sliding-scale of rates, fares, or charges; provided that a schedule showing such scale of rates, fares, or charges shall first have been filed with the Commission and approved by it.

[\*1387] \*To establish, with the consent of the Commission, a scale of charges, subject to automatic adjustment, in relation to the dividends to be paid to the stockholders of such public service company, or the profit to be realized by any person engaged in like business.

To participate, to such an extent as may be permitted by the Commission, and deemed by the Commission wise, for the purpose of encouraging economies, efficiencies, or improvements in methods or service, in the additional profits which will be afforded by such economies, efficiencies, or improvements in methods or service.

(b). To employ, in the conduct and management of its business, suitable and reasonable classifications of its service, patrons, and rates; and such classification may, in any proper case, take into account the nature of, the use, and quantity used, the time when used, the purpose for which used, the kind, bulk, value, and

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(c) It is otherwise where cars stand on railroad company's tracks. *Miller Const. Co. v. P. S. & N. R. R. Co.*, 1 P. S. C. Rep. 26, or when the cars, though private, are not the property of those who own the sidings on which the cars stand. *P. R. R. Co. v. Waverly Co.*, 58 Pa. Super. 154.

(d) No demurrage should be charged on cars which, by reason of the cargo being frozen, were incapable of being unloaded within the free period after constructive delivery, and were unloaded within the period after the condition of the cargo permitted. *Terminal Coal Co. v. P. R. R.*, 1 P. S. C. Rep. 148.

(e) Where cars shipped to Chicago for re-consignment are held on the storage tracks some distance from the terminals, but convenient to the belt line by which cars are transferred to any new destination, demurrage may be charged from the time of arrival upon the storage tracks. *Berwind-White Coal Mining Co. v. C. & E. R. R. Co.*, 235 U. S. 371, 59 L. Ed. —.

**III. Trackage Charges.** A lumber company owned rights of way on which short stub lines, connecting with a main line, were built by a carrier. Held: the carrier could not collect a trackage charge of \$1.00 per car on all traffic, other than that of the lumber company, passing over said stub lines, and pay same to the lumber company. *McCallum v. Minneapolis & R. R. Ry. Co.* (Minn.), 151 N. W. 974.

facility of handling of commodities, and any other reasonable consideration.<sup>74</sup>

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**74. Classification of Patrons and Rates—Reasonableness. A. In General.** (a) The provisions of this section are limited by those of Art. III, Sec. 8, (a) and (b). So it was held that a classification which produced discrimination, when tested by the provisions of that section, could not be justified under the provisions of this one. *Birdsboro Stone Co. v. P. & R. Ry. Co.*, 2 P. C. R. 264.

(b) Where such classification of service is on file with the Commission and is not shown to be unreasonable, complaint as to its effect in a particular case will be dismissed. *Meter v. Metropolitan Elec. Co.*, 2 P. C. R. 117.

**B. Electric Service Companies.** In making classifications the company is not limited to the methods of production, distribution, etc., but may take into account the nature of, use, quantity, the time when used, the purpose for which used, etc., and this classification extends to the customer, his uses and requirements. *Thompson & Hanna Co. v. Erie Co. Elec. Co.*, 2 P. C. R. 199.

**C. Gas Companies.** The placing of hotel companies in a separate class, by a natural gas company, is reasonable, where there is a substantial difference in the equipment used, and where the rates applicable may be obtained by all hotels alike. *Elk Hotel Co. v. United Fuel Gas Co. (W. Va.)*, 83 S. E. 922.

**D. Inclined Plane Companies.** In the operation of an inclined plane a classification of vehicles which is based upon the number of seats, or the number of horses attached, subdivided as between pleasure vehicles and otherwise, is reasonable and lawful. A classification based upon the weight of, or the space occupied by, the vehicle, would interfere with the efficiency of the service and would delay traffic. *Geer v. Cambria Inclined Plane Co.*, 2 P. C. R. 455.

**E. Railroads.** A carrier may not differentiate between shipments or commodities according to their places of origin, nor attempt to distribute profits equitably between rival manufactories. *Adrian Furnace Co. v. P. R. R. Co.*, 2 P. C. R. 632. Crushed stone for "railroad ballast" and for commercial purposes must be carried at the same rate. There is no difference in the service rendered by reason of which they should be put into different classes. *Birdsboro Stone Co. v. P. & R. Ry. Co.*, 2 P. C. R. 264. In re classification of pulp wood. *W. Va. Pulp & Paper Co. v. P. R. R. Co.*, 2 P. C. R. 673.

**F. Telephone Companies.** There is a reasonable difference between the value of telephone service for residence and for business purposes. *Wolverton v. Mountain States Tel. & Tel. Co. (Colo.)*, 142 Pac. 165. A subscriber who has a contract at residence rates cannot compel service at those rates when the service is really for business purposes. *Id.*

**G. Turnpike Companies.** A rate of toll for automobiles which is

(c). To have reasonable rules and regulations, subject to existing law and the provisions of this act, governing the conduct of its business and the conditions under which it shall be required to render service.<sup>76</sup>

higher than the rate for horse drawn vehicles, is reasonable. *Zook v. Turnpike Co.*, 2 P. C. R. 194.

#### 75. COMPANY RULES AND REGULATIONS—REASONABLENESS.

**A. Electric Companies.** The regulation of an electric light company requiring customers who are not property owners, or who have not in some manner shown their ability to pay for service, to deposit \$5.00 before the installation of service, is a reasonable regulation. *Cauffiel v. Citizens L., H. & P. Co.*, 2 P. C. R. 189. A regulation which requires the installation of separate meters for lighting and for running a motor by which to operate an X-ray machine, and charges separate rates therefor, is reasonable. *Meter v. Metropolitan Elec. Co.*, 2 P. C. R. 117. A regulation refusing electric service to a customer unless he purchased his entire supply from the company, is unreasonable. *People v. Pub. Ser. Com.*, 148 N. Y. Suppl. 583. A minimum monthly charge of \$1.00 for electric service is reasonable. *Cauffiel v. Citizens L., H. & P. Co.*, 2 P. C. R. 189.

**B. Railroad Companies.** (a) A regulation making railroad tickets valid only when presented by the purchaser, is valid. *Salomon v. N. Y. C. & H. R. R. Co.*, 150 N. Y. Suppl. 282. Rule requiring that tickets purchased will not be redeemed if unused, is valid. *Id.* Rule requiring an extra fare from passengers boarding a train without tickets, is reasonable. *Ponder v. Lex. & E. Ry. Co. (Ky.)*, 174 S. W. 786.

(b) The words "when presented," in a rule providing for the redemption of unused tickets, are equivalent to "in case it is presented" or "on condition that it be presented." *Texas & P. Ry. Co. v. Beaird (Tex.)*, 169 S. W. 1050.

(c) Rule refusing to accept local passengers on through train, is reasonable. *Arthurs v. P. R. R. Co.*, 1 P. S. C. Rep. 44. Rule that local passengers will not be carried on detoured train, is reasonable. *So. Ry. Co. v. McNabb (Tenn.)*, 169 S. W. 757. Rule which forbids receipt or delivery on private sidings of less than carload freight weighing less than 10,000 lbs., is reasonable. *Venango Oil Sup. Co. v. P. R. R.*, 1 P. S. C. Rep. 26. Rule requiring prepayment of freight consigned to non-agency stations, is reasonable. *Tressler, &c., Co. v. P. & R. Ry.*, 1 P. S. C. Rep. 39.

**C. Street Railway Companies.** Rule requiring the holder of a transfer to take the next succeeding car at the transfer point, is reasonable. *Taylor v. Spartansburg Ry. G. & E. Co. (S. Car.)*, 82 S. E. 404.

**D. Telephone Companies.** A telephone company has the right to indicate what attachments, if any, may be placed upon its instruments. *Felin & Co. v. Bell Tel. Co.*, 1 P. S. C. Rep. 247. Rule charging non-

It may require the payment of charges in advance, the making of reasonable minimum payments and deposits to secure future payments of such charges; or it may allow discounts for prompt payments of the same, or impose penalties for failure to pay promptly.<sup>76</sup> Provided, That such advance charges, minimum payments, desposits, discounts, or penalties are reasonable and apply equally and without discrimination or preference to all shippers, consumers, and patrons, under like conditions and under similar circumstances.<sup>77</sup>

(d). To apply to the Commission by complaint, in the manner hereinafter provided in this act, whenever such company claims

subscribers for use of telephone service, is reasonable. *Rudert v. Saxonburg Tel. Co.*, 1 P. S. C. Rep. 176. Rule requiring payment of rentals to be made at the company's offices, is reasonable. *State v. Kenosha Home Tel. Co. (Wis.)*, 148 N. W. 877.

A rule of a telephone company that it will not furnish service to any patron in arrears for past service, and will not allow to a patron so in arrears, the discount usually allowed for payment in advance of a designated time, was held unreasonable and discriminatory by the Supreme Court of Arkansas (102 Ark. 547, 144 S. W. 925) and a fine of \$6,300 upon the company was sustained. On appeal, the Supreme Court of the United States held that inasmuch as no statute or decision of the state had theretofore declared the rule unreasonable and that it had been made in good faith, the imposition of the penalty was a taking of property without due process of law. *Southwestern Tel. & Tel. Co. v. Danaher*, U. S. Adv. Ops. 1914, 886, 59 L. Ed.—.

**E. Water Companies.** Rule providing that water shall be cut off if the bills are not paid by the consumer, is reasonable. *Louisville Tobacco Warehouse Co. v. Louisville Water Co. (Ky.)*, 172 S. W. 928. But one providing that it shall not be turned on again until full payment is made, and that "no change of ownership or occupation shall effect the application of the rule," is unreasonable. *Nourse v. Los Angeles (Cal.)*, 143 Pac. 801. Rule requiring that all water meters installed by customers shall read in cubic feet, instead of gallons, is reasonable. *Lare v. Penna. Water Co.*, 2 P. C. R. 733. Rule requiring customers to install meters at their own expense, is reasonable. *Farkas v. City of Albany (Ga.)*, 82 S. E. 144.

76. The exact circumstances and conditions under which discounts are allowed or penalties imposed, must be filed with the Commission. Administrative Ruling No. 6, 2 P. C. R. 386.

77. (a) *Good Shepherd Home v. Lehigh Valley L. & P. Co.*, 2 P. C. R. 187; *Wadley Southern R. Co. v. Georgia*, 137 Ga. 497, 73 S. E. 741; affirmed in 235 U. S. 651, 59 L. Ed. —.

(b) In passing upon the question of a violation of its rules, a company

to be aggrieved by any ruling, regulation, classification, or order which it is or has been required by the Commission to observe or carry into effect; and thereupon such public service company shall be entitled to a full and fair hearing, and a speedy determination of its complaint on the merits, by the Commission, and to all just and reasonable relief consistent with the rights and duties of such public service company.

(e). Whenever any owner of property transported by any common carrier, or any user or patron of any other public service company, renders, directly or indirectly, any service<sup>78</sup> connected with such transportation or other public service, the charge and allowance therefor shall not be more than is just and reasonable; and the Commission may, after hearing, on its own motion or upon complaint, determine what is a reasonable charge, as a maximum, to be paid by the carrier or other public service company for the use of the service so furnished or rendered, and what is a proper proportion of the said cost, and fix the same by appropriate order, to be observed and enforced by the parties concerned.

Section 2. Upon the approval of the Commission evidenced by its Certificate of Public Convenience,<sup>79</sup> first had and obtained, and not otherwise, it shall be lawful for any proposed<sup>80</sup> public service company—

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decides at its peril. If it discriminates, it is liable in damages. *Louisville Tobacco Warehouse Co. v. Louisville Water Co.* (Ky.), 172 S. W. 928.

78. (a) The inter-plant service of an industry is not part of the transportation service of the carrier but is wholly distinct. *Crucible Steel Co. v. P. R. R. Co.*, 2 P. C. R. 599; *Same v. Same*, 1 P. C. R. 49.

(b) A switching service is a movement of a car from one point to another within a station or terminal area. Although the distance over which a car may move upon the main line is short, there is a road haul. *Penna. Rubber Co. v. P. R. R.*, 2 P. C. R. 31.

(c) A shipper may receive payment for furnishing cars. *Id.*

79. Before a Certificate of Public Convenience is issued it must be established that the desired service is necessary and proper for the accommodation, safety or convenience of the public. *Application of Harmony Elec. Co.*, 2 P. C. R. 42; *Borough of Exeter's Petition*, 2 P. C. R. 52 and 539; *Borough of Avoca's Petition*, 2 P. C. R. 372; *Petition of Twp. of Jenkins*, 2 P. C. R. 680; *Petitions of East End Elec. L., H. & P. Co.*, 2 P. C. R. 714. See also Art. V, Sec. 18, post.

80. This word "proposed" cannot be applied to a corporation in exist-

(a). To be incorporated,<sup>81</sup> organized, or created:<sup>82</sup> Provided, That existing laws relative to the incorporation, organization, and creation of such companies shall first have been complied with, prior to the application to the Commission for its Certificate of Public Convenience.

(b). To begin the exercise of any right,<sup>83</sup> power, franchise, or privilege, under any ordinance, municipal contract, or otherwise.<sup>84</sup>

Section 3. Upon like approval of the Commission first had and obtained, as aforesaid,<sup>85</sup> and upon compliance with existing laws, and not otherwise, it shall be lawful—

(a). For any public service company to renew its charter, or obtain any additional rights, powers, franchises, or privileges, by any amendment or supplement to its charter, or otherwise.<sup>86</sup>

(b). For a foreign public service company, upon compliance with existing laws, if any there be permitting such foreign company to exercise its powers and franchises within this Commonwealth, to obtain the right to do business within this Commonwealth.<sup>86</sup>

ence with all its powers and franchises before the passage of the act. *Penna. Utilities Co. v. Lehigh Nav. Elec. Co.*, 2 P. C. R. 74, affirmed 2 P. C. R. 422.

81. It is doubtful whether the Commission has power in effect to amend the charter of a corporation upon proceedings for the approval of its incorporation. *Application of Potato Creek Gas Co.*, 2 P. C. R. 491.

82. See Rules of Practice and Procedure, Rule 24. 2 P. C. R. 12.

83. Art. I, Sec. 1, divides public service companies into two classes, (1) corporations, and (2) all persons engaged for profit in the same kind of business. Paragraph (a) of this section refers to the first class, and paragraph (b) to the second class. *Penna. Utilities Co. v. Lehigh Nav. Elec. Co.*, 2 P. C. R. 74, affirmed 2 P. C. R. 422.

84. See note 79 supra. See Art. V, Sec. 18.

85. (a) See Rules of Practice and Procedure, Rule 26. 2 P. C. R. 15.

(b) The extension of a trolley line will not be approved in the absence of sufficient data showing the population to be served, etc. The fact that individuals are willing to risk their money in the enterprise is not sufficient to justify approval of it. *Application of Reading, &c., R. R. Co.*, 2 P. C. R. 536.

86. (a) See Rules of Practice and Procedure, Rule 27, 2 P. C. R. 17.

(b) The Commission will not authorize a foreign corporation to conduct a business here which the laws of this state do not empower her own corporations to carry on. Approval of trackless trolley refused. *Perkio-men Elec. Tr. Co.'s Petition*, 2 P. C. R. 334.

(c). For any public service company to sell,<sup>87</sup> assign, transfer, lease, consolidate, or merge<sup>88</sup> its property, powers, franchises, or privileges, or any of them, to or with any other corporation or person.<sup>89</sup>

(d). For any municipal corporation to acquire, construct, or begin to operate, any plant, equipment or other facilities for the rendering or furnishing to the public of any service of the kind or character already being rendered or furnished by any public service company within the municipality.<sup>90</sup>

87. The power of the commission is permissive only and is to be exercised only on application of the vendor. It will not be exercised upon the application of a vendee under a contract who seeks to compel a transfer. *Hanlon v. Eshleman* (Cal.), 146 Pac. 656.

88. (a) Where a merger of gas companies will not seriously interfere with the business of the protestant and will result in more economical and efficient operation by the petitioners, the merger will be approved. *Application of E. Penn Gas Light Co.*, 2 P. C. R. 688.

(b) Where the lines of two railroad companies to be merged are not competing or parallel, the merger is not forbidden by the Constitution. The fact that one of these roads owns the stock of a road parallel to it is no objection to its merger with a third whose lines are not parallel or competing. The purchase and ownership of the stock may have been unlawful, but they do not affect the merger. The merger and consolidation of continuous lines of railroads has become a part of the settled policy of the law of Pennsylvania, and such merger should be approved unless it be shown to be within some prohibition of the law; to work some injustice to vested rights, or to be of disadvantage to the public. *Petition of L. S. & M. S. Ry. Co., et al.*, 2 P. C. R. 377. The question of the operation of competing lines between Buffalo and Chicago and between New York and Buffalo, is a matter without the Commonwealth and beyond the jurisdiction of the Commission. *Id.*

89. See Rules of Practice and Procedure, Rule 28. 2 P. C. R. 18.

90. (a) See Rules of Practice and Procedure, Rule 25. 2 P. C. R. 14.

(b) This act does not effect a change of procedure merely, but qualifies the former rights of municipalities to take over the property of water companies within their limits, and is not retroactive so as to require the approval of the Commission of proceedings pending when the act became effective. *Reynoldsville Boro. v. Reynoldsville Water Co.*, 247 Pa. 26, 92 Atl. 1082.

(c) Proceedings which have been instituted since Jan. 1, 1914 for the acquisition of water works by a municipality will be invalid without the approval of the Commission. *New Brighton Boro. v. New Brighton Water Co.*, 247 Pa. 232.

Provided, however, That nothing herein contained shall interfere with or affect the right or power of a municipal corporation to continue the operation of its municipal plant, or to extend the same, within the territory of such municipal corporation, or any part thereof, which is not then being supplied by a public service company rendering or furnishing service of a like kind or character:<sup>91</sup> And provided further, That any municipal corporation [\*1389] which, at the time this act \*becomes effective, has, by authority of law, in process of construction<sup>92</sup> any such plant for the rendering or furnishing to the public of any such service, may proceed with and complete the said construction, and begin to operate the same, without the aforesaid approval of the Commission first had and obtained.<sup>93</sup>

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(d) The jurisdiction of the Commission extends only to cases where the proposed municipal plant would compete with a private company. In *re Approval of Erection of Municipal Water Plant*, 2 P. C. R. 104. Approval is not necessary in order for a municipality to manufacture electricity for lighting its streets and not for sale to others. *Borough of Gettysburg's Petition*, 2 P. C. R. 331.

(e) Where a water company operating in a borough is unable to furnish an adequate supply of water, and the borough, being in urgent need of such supply, asks the approval of the Commission for the construction of a municipal system, the Commission will not withhold its approval until the borough has agreed to purchase the company's plant. *Borough of Gallitzin's Application*, 2 P. C. R. 369.

(f) When a city assumes the duty of operating a water system for the purpose of supplying its inhabitants, it acts, in the performance of this duty, not in its sovereign capacity, but in the capacity of a private corporation engaged in like business. *Nourse v. Los Angeles (Cal.)*, 143 Pac. 801.

(g) Some states, e. g. Kansas, expressly exclude municipalities from the operation of their acts governing public utilities. *Humphrey v. Board of Com'rs (Kan.)*, 144 Pac. 197.

91. To extend a municipal plant to streets supplied by a public service company requires the approval of the Commission. *Bethlehem City Water Co. v. Boro. of Bethlehem*, 1 P. C. R. 227, 230.

92. A municipality which had taken only preliminary steps to the construction of a water plant, and which had not secured a permit from the Commissioner of Health, did not have its plant "by authority of law, in the process of construction," and the approval of the Commission was therefore necessary. *Consolidated Water Co.'s Petition*, 1 P. C. R. 190.

93. *Bondholders of Allegheny Valley Water Co. v. Boro. of Tarentum*, 2 P. C. R. 518.



Section 4. It shall be lawful for any public service company—

(a). To issue stocks, trust certificates, bonds, notes, or other evidences of indebtedness or other securities, or make any increase in the issue thereof, in the manner prescribed by law, for and only for money, labor done, or money or property actually received, in accordance with the requirements of the Constitution and the laws of the Commonwealth.

All stocks, trust certificates, bonds, notes, or other evidences of indebtedness or other securities, issued in violation of this subsection, and all fictitious increase of stock, trust certificates, bonds, notes, or other indebtedness or securities, shall be void.

Application as hereinafter provided may be made by such public service companies to the Commission for a certificate of valuation, to the effect that the provisions of this section have been complied with as to any stocks, trust certificates, bonds, notes, or other evidences of indebtedness or other securities, issued after the passage of this act; such application shall certify as to the number and amount thereof to be issued and the purpose of such issue, and shall contain such other facts and detailed information, and be in such form, as the Commission shall determine and prescribe,<sup>94</sup> and shall be signed and verified by the affidavit of the treasurer, auditor, controller, or other acting fiscal head of the public service company.

(b). Every public service company shall file with the Commission,<sup>95</sup> on prior to the date of issuance of any stock, trust certificates, bonds, notes, or other evidences of indebtedness or other securities, payable at periods of more than twelve months after the date thereof, and now or hereafter to be authorized (unless, upon application as aforesaid, a certificate of valuation shall have been obtained in accordance with the provisions of this act), a certificate to be known as a Certificate of Notification, in such form as the Commission may, from time to time, determine and prescribe,<sup>96</sup> which, among other things that may be required by the Commission, shall show—

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94. See Rules of Practice and Procedure, Rule 35. 2 P. C. R. 26.

95. Statement of Certificates of Notification filed from Jan. 1, to June 30, 1914. 1 P. S. C. Rep. Appendix "H," pp. 337-396.

96. The Commission has prepared a form for use in filing Certificates of Notification of the issuance of any trust certificates, bonds, notes, or

I. The total amount thereof.

II. The number and amount thereof outstanding prior to the date of such certificate, the amount thereof theretofore retired, the amount thereof theretofore undisposed of, and whether such [\*1390] amount is held in the \*treasury of the public service company as a free asset or pledged, and, if pledged, the terms and conditions of such pledge.

III. The number and amount thereof to be issued and the purpose of such issue, and whether to be sold, pledged, or held in the treasury of the public service company as a free asset; if such securities are to be sold, the terms of sale if a contract for such sale has been made, and if any part of the consideration to be received therefor is other than money, an accurate and detailed description thereof; if such securities are to be pledged, the terms and conditions of such pledge.

IV. The number and amount thereof remaining unissued.

V. If the issue is of shares of stock, the certificate shall also show the par value thereof, and the number of then outstanding shares previously issued.

VI. The preference or privilege granted to the holders of any such shares of stock, the dates of maturity, rates of interest of any such bonds, notes or other evidences or indebtedness or other securities, and any conversion rights granted to the holders thereof, and the price, if any, at which such shares or such securities may be redeemed.

(c). Whenever any securities, set forth and described in any Certificate of Notification as pledged or held as a free asset in the treasury of the public service company, shall, subsequent to the filing of such certificate, be sold or repledged or otherwise disposed of by the public service company, such company shall file a further Certificate of Notification to that effect, setting forth therein all such facts as are required by subdivision III, subsection (b), of this section four.

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other evidences of indebtedness, or other securities payable at periods of more than twelve months (not including stocks), with instructions for preparing the same, which form and instructions must be followed in cases of Certificates filed after August 1, 1915. Copies of the form may be had upon application to the Secretary.

(d). All Certificates of Notification furnished to the Commission shall be signed and verified by the affidavit of the treasurer, auditor, controller, or other acting fiscal head of the public service company. Such Certificates of Notification shall at all times be deemed to be public records, and open to inspection, and may be given such further publicity as the Commission may deem to be for the public interest or welfare.

The provisions of this act contained in regard to Certificates of Valuation, and, unless so required by the Commission, in regard to Certificates of Notification, shall not apply to the issuance of bonds, notes, or other evidences of indebtedness payable at periods of twelve months or less, nor to the pledging or re-pledging of stocks, trust certificates, bonds, or other evidences of indebtedness, to secure such bonds, notes, or evidences of indebtedness, payable at periods of twelve months or less; but if such bonds, notes, or [\*1391] \*other evidences of indebtedness, shall, in whole or in part, directly or indirectly, be refunded by any issue of bonds, notes, or other evidences of indebtedness running for more than twelve months, then the said mentioned provisions with regard to Certificates of Notification and Valuation shall apply.

Neither the filing with the Commission of any Certificate of Notification, nor the issuing by the Commission of any Certificate of Public Convenience or Certificate of Valuation, and nothing therein or in this act contained, nor any hearing had, nor finding nor order nor decree made by the Commission, nor any act or thing done by any public service company in pursuance thereof, nor any act or thing done by the Commission under the provisions of this act, shall in anywise affect the validity, if any, of any stocks, trust certificates, bonds, notes, or other evidences of indebtedness or other securities, issued or assumed or guaranteed, prior to the date when this act shall become effective, by any public service company.

Section 5. Upon the approval of the Commission, evidenced by its Certificate of Public Convenience first had and obtained, and not otherwise,<sup>97</sup> it shall be lawful for any railroad corporation

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97. (a) See Rules of Practice and Procedure, Rule 33. 2 P. C. R. 23.

(b) Where a contract is made between a township and a railroad company providing for the abolition of a crossing, the approval of the contract and the approval of the crossing should be sought in separate pro-

or street railway corporation to construct its tracks or other facilities across the tracks or other facilities of any other railroad corporation or street railway corporation,<sup>98</sup> or across any public highway, at grade, or above or below grade; or for any public highway to be constructed across the tracks or other facilities of any railroad corporation or street railway corporation at grade, or above or below grade; or for any public service company to construct any of its facilities across the facilities of any other public service company at the same or different levels.<sup>99</sup> And it shall be lawful, upon like approval first had and obtained, and not otherwise, for any public service company to alter, relocate, remove,

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ceedings. *Application of Supervisors of Concord Twp.*, 2 P. C. R. 590.

(c) The evidence in support of a petition for approval of a grade crossing must be certain and convincing. *Petition of Cornwall & Lebanon R. R. Co.*, 2 P. C. R. 388.

98. (a) Such approval will be given where the public necessity demands it, but will be given subject to such conditions as are necessary to guard the public safety. *Petition of Phoenixville, &c., Ry. Co.*, 2 P. C. R. 191.

(b) The Commission will alter plans and specify safety appliances when necessary. *Application of Gaffney & James Cy. R. R.*, 2 P. C. R. 112.

99. (a) For procedure to be followed to secure approval of crossing of facilities, see *General Order No. 11*, 2 P. C. R. 102, and *Administrative Ruling No. 8*, to be reported in the early pages of Vol. 3, P. C. R.

(b) An injunction will not issue from a Court of Common Pleas to restrain the construction of a crossing made contrary to the terms of a Certificate of Public Convenience. Complaint must be made to the Commission under Art. VI, Sec. 6, post. *Citizens' Elec. Ill. Co. v. Consumers' Elec. Co.*, 2 P. C. R. 426, 17 Luz. L. R. 413.

(c) Where a company, after securing a Certificate of Public Convenience evidencing the approval of the Commission of the construction of certain crossings of its wires over those of another company, proceeds to construct crossings other than those mentioned in the Certificate, the Commission must take cognizance of the fact as a practice contrary to law. However, if the additional crossings are in fact constructed in a manner proper for the safety and convenience of the public, the Commission will not order their removal. *Citizens' Elec. Ill. Co. v. Consumers' Elec. Co.*, 2 P. C. R. 384; *Cf. Slate Belt Tel. & Tel. Co. v. Blue Mt. Tel. & Tel. Co.*, 2 P. C. R. 403.

or abolish any such crossing:<sup>1</sup> Provided, however, That in all cases in which the tracks or other facilities of a railroad corporation or street railway corporation cross the tracks or other facilities of another railroad corporation or street railway corporation or a public highway at grade, and such crossing is at the time this act becomes effective in process of abolition, under and in accordance with an agreement or contract entered into with any municipality providing for such abolition, it shall be lawful to proceed with the consummation of such abolition as provided in such agreement or contract, without the aforesaid approval of the Commission first being obtained.

Section 6. It shall be unlawful for any public service company—

[\*1392] \*(a). To capitalize its franchises, rights, powers, privileges, or right to own and operate or enjoy any such franchises, rights, powers, or privileges, in excess of the amount paid to the Commonwealth or any political subdivision thereof as the consideration for the grant thereof; or to capitalize any lease, or contract of sale, or contract for consolidation or merger of two or more public service companies; or to issue by way of substitution any capital stock, trust certificates, bonds, notes, or other evidences of indebtedness or other securities, for any consolidated or merged company, exceeding the aggregate values of the properties of the companies so consolidated or merged, and any additional sum actually paid in, in cash, and any additional property or labor actually contributed: Provided, That any such public service company or companies may apply to the Commission to determine such consideration or value, aforesaid.

(b). In the case of any reorganization under the provisions of the act of assembly approved the eighth day of April, Anno Domini one thousand eight hundred and sixty-one, entitled "An act concerning the sale of railroads, canals, turnpikes, bridges, and plank roads," or any supplement thereto or amendment thereof, to issue any stock, trust certificates, bonds, notes or other evi-

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1. (a) The Commission has jurisdiction where a portion of a highway is vacated. *In re Grade Crossings, &c.*, 2 P. C. R. 536.

(b) *Borough of Butler's Petition*, 2 P. C. R. 63; *Wilkes-Barre v. L. V. R. R. Co.*, 2 P. C. R. 278; *Application of Wilkes-Barre Connecting R. R. Co.*, 2 P. C. R. 470.

dences of indebtedness or other securities, in excess of the amount paid or agreed to be paid to the Commonwealth or any political subdivision thereof, as the consideration for the grant of any franchises, rights, powers, or privileges, and the value of the property of such reorganized corporation (and any additional sum actually paid in cash, and any additional property or labor actually contributed): Provided, That any such public service company may apply to the Commission to determine such consideration or value, aforesaid.

(c). To purchase, acquire, take or hold, either in absolute ownership or in pledge, or as collateral security, directly or indirectly, any controlling right, title, or interest, legal or equitable, in the capital stock, bonds, trust certificates, or other evidences of indebtedness or other securities, issued by, or other controlling right, title, or interest whatsoever in, any other public service company, conducting business within this Commonwealth, without the consent and approval of the Commission;<sup>2</sup> but the purchase, taking and holding, aforesaid, of any right, title, or interest in any such capital stock, bonds, trust certificates, or other evidences of indebtedness or other securities, or of any other right, title, or interest in any other public service company, which shall amount to less than the aforesaid controlling right, title, or interest, [1393] est, of any nature or kind, shall be lawful without the approval of the Commission, so far as the same may be lawful under existing laws: Provided, however, That nothing in this act shall be construed to affect the holding of stock, bonds, trust certificates, or other evidences of indebtedness or other securities, heretofore legally acquired and held; or in any way diminish, lessen, or impair the rights of any public service company, in virtue of the holding by said company of such stocks, trust certificates, bonds, notes, or other evidences of indebtedness or other

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a. (a) See Rules of Practice and Procedure, Rule 29.    2 P. C. R. 20.

(b) A street railway has the right to acquire, hold, etc., the stock of a light, heat and power company, and by such acquisition, holding, etc., 1—It is not engaged in a business other than that expressly authorized by its charter, forbidden by Art. XVI, Sec. 6, of the Constitution. 2—It is not directly or indirectly engaging in any other business than that of common carriers, forbidden by Art. XVII, Sec. 5, of the Constitution. In re Application of York Rwy. Co., 2 P. C. R. 540 (Op. Atty. Gen.).

securities, hertofore acquired and held; or to prevent the future acquisition of such stocks, trust certificates, bonds, notes, or other evidences of indebtedness or other securities of a public service company, where the major interest therein has been acquired and held by a public service company prior to the date when this act shall become effective; or to prevent the future acquisition, holding, or cancellation by a public service company of trust certificates, bonds, notes, or other evidences of indebtedness or other securities secured by stock, theretofore legally acquired and owned by a public service company and pledged as security therefor.

Section 7. It shall be unlawful for any public service company after the first day of January, one thousand nine hundred and fourteen, to render or furnish, or to offer to render or furnish, within this Commonwealth, any service of the kind or character rendered or furnished by it, until it shall have filed and posted its tariffs and schedules in accordance with the provisions of subsection (d) of section one of article two.<sup>3</sup>

Section 8. It shall be unlawful for any public service company—

(a). To charge, demand, collect, or receive, directly or indirectly, by any special rate, rebate,<sup>4</sup> drawback, abatement, or other device whatsoever,<sup>5</sup> from any person or corporation, for any serv-

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3. In the matter of filing tariffs, see **General Order No. 8**, 1 P. C. R. 178; Rules and Regulations governing form of tariffs and schedules, **Circular No. 5**, 1 P. C. R. 44; and **Tariff Circulars**, Nos. 1 and 2, 2 P. C. R. 91-98.

4. (a) The application of transit rates to shipments which are sold or consumed at the transit point, constitutes rebating. **Nichols & Cox Lumber Co. v. U. S.**, 212 Fed. 588.

(b) A milling in transit agreement whereby a manufacturer of feed paid local rates on corn and oats shipped to the mill, and after making the feed, of which said corn and oats constituted only half, shipped the whole amount of the feed out of the mill at through rates and received a refund of the difference between the local inbound rate and the proportional amount of the through rate, constituted a rebate, and was illegal. **Lewis, Leonhardt & Co. v. Southern Ry. Co.**, 217 Fed. 321.

5. Where the application of the general demurrage rules works a discrimination, the tariffs filed should be amended so as to exempt the case from the operation of the rules. **Pittsburgh Plate Glass Co. v. P. R. R. Co.**, 2 P. C. R. 530 and 695.

ice rendered or to be rendered, a greater or less compensation or sum than it shall demand, charge, collect, or receive from any other person or corporation for a like and contemporaneous service under substantially similar circumstances and conditions.<sup>6</sup>

Provided, however, That where, as the result of a bona fide mistake or error of a common carrier, the full tariff charges are not collected in the first instance, and the balance is subsequently found to be due and outstanding, the collection of such balance may be waived by the carrier, provided the matter is submitted to the Commission, and its approval of such waiver is first had and obtained.<sup>7</sup>

(b). To make or give any undue or unreasonable preference<sup>8</sup> [\*1394] or advantage in favor of or to any person \*or corporation or any locality, or any particular kind or description of traffic or service, in any respect whatsoever; or to subject any particular person or corporation or locality, or any particular kind or description of traffic or service, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.<sup>9</sup>

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6. The services rendered in transporting crushed stone for commercial purposes and for "railroad ballast" are rendered under substantially similar circumstances and conditions. The fact that a railroad is the consignee in the one case, and that crushed stone for commercial purposes does not enter into competition with "railroad ballast," does not affect the service rendered. A lower rate upon the one than upon the other is discriminatory. *Birdsboro Stone Co. v. P. & R. Ry. Co.*, 2 P. C. R. 264. See also Art. III, Sec. 8, (b) post, and notes thereto.

7. *L. & N. R. Co. v. Maxwell*, 237 U. S. 94, 59 L. Ed. —.

8. *Birmingham Water Works v. Brown* (Ala.), 67 So. 613.

9. **DISCRIMINATION. IN GENERAL.** (a) An undue and unreasonable advantage or preference results only from allowing to one person what is denied to another, under substantially the same circumstances and conditions. Any fact which produces an inequality of conditions and a change of circumstances, justifies an inequality in the rate. *Elk Hotel Co. v. United Fuel Gas Co.* (W. Va.), 83 S. E. 922; *State v. Missouri, K. & T. Ry. Co.* (Mo.), 172 S. W. 35.

(b) What is an "undue or unreasonable prejudice or disadvantage" is a question of fact, not of law. *Pennsylvania Co. v. U. S.*, 236 U. S. 351, 59 L. Ed. —.

(c) A natural gas company cannot be compelled to furnish all patrons with all the gas they may need, but is bound to serve them with a reasonable degree of equality. *Clairton Steel Co. v. Man'f'rs. L. & P. Co.*, 240 Pa. 427, 87 Atl. 998.



(d) If a carrier's regulation be waived for one person, it is waived as to all under like conditions, and is as though it had never been adopted. *Coleman v. Penna. R. R.*, 242 Pa. 304, 313.

(e) Discrimination is not justified by the fact that a shipper is about to violate the carrier's rules and regulations. *Louisville & N. R. Co. v. Ohio Valley Tie. Co. (Ky.)*, 170 S. W. 633.

**A. BETWEEN LOCALITIES. I. In General.** (a) The term "locality" includes points of destination, as well as shipping points. *P. & R. Ry. v. U. S.*, 219 Fed. 988.

(b) A charge of discrimination cannot be brought by a locality against a railroad that does not serve that locality, either directly or by joint arrangement with other roads for a through route and a joint rate. *St. L., I. M. & S. Ry. Co. v. U. S.*, 217 Fed. 80.

**II. Rates and Practices held Discriminatory.** (a) A carrier may not differentiate between shipments or commodities according to their places of origin, nor attempt to distribute profits equitably between rival manufactories. If the local rate on a connecting line is unreasonably low, the remedy is by complaint to the Commission. *Adrian Furnace Co. v. P. R. R. Co.*, 2 P. C. R. 632.

(b) To charge a lower rate in one locality merely because a prior rate based upon an antiquated and inferior service had been in effect, would discriminate against other localities similarly situated. *Lehigh Valley Coal Co. v. Bell Tel. Co.*, 2 P. C. R. 441.

(c) The same classes of tickets for suburban traffic should be sold on all suburban lines and no arbitrary discrimination made between stations on the same or different lines. *Combined Committee, etc., v. P. R. R. et al.*, 2 P. C. R. 390, 717, and 728.

(d) A charge of \$2 for reconsignment at one point while the same service is done free of charge at another point, is discriminatory. *L. V. R. R. Co. v. American Hay Co.*, 219 Fed. 539.

(e) Where a company combined with others in fixing rates to points east and south of J., and in fixing rates to J. when shipments were destined for trans-shipment, but charged a higher rate on shipments for local delivery at J., it was held that the company unjustly discriminated against J. *P. & R. Ry. v. U. S.*, 219 Fed. 988.

(f) A rate of \$5.00 per car on lime for a haul of 7,976 feet is discriminatory as against a rate of \$2.00 per car on limestone for a haul of 3,933 feet to the same destination. *Empire Lime Kilns v. C. R. R. Co. of Pa.*, 1 P. S. C. Rep. 155.

**III. Effect of Competition.** (a) Where a special discount was allowed by a water company to patrons on certain streets because the municipal water plant had invaded the territory and offered service at lower rates, the Commission held: The discrimination forbidden by this Act is a charge for "a like and contemporaneous service under substantially similar circumstances and conditions." Competition that is real and sub-

stantial and which exercises a potential influence on rates, may create such dissimilarity of circumstances and conditions that a lower rate at the competitive point will not come within the prohibition of the act. Whether competition actually does produce such dissimilarity must be determined from the facts of each case as it arises. *Goerlich v. Bethlehem City Water Co.*, 1 P. C. R. 213.

(b) In determining whether or not there has been a discrimination against freight locally delivered, the question of the effect of competition on through freight, if it exists, is to be given due consideration. *Philadelphia v. P. & R. Ry. Co.*, 2 P. C. R. 313. A great city lying near the fields of anthracite coal ought not to be burdened with an undue share of the cost of transportation because of the fact that it is dependent upon this supply for heat and power and has no other resource for having it transported. *Id.*

(c) The charging of a lower rate in a locality where there is active competition, is not discriminatory. *Lewistown v. Penn Cent. L. & P. Co.*, 2 P. C. R. 249.

**IV. Rates and Practices held Not Discriminatory.** (a) The rate on cement in Penna., from the Nazareth district to Easton, which is 10c per ton higher than the rate from the Lehigh district to Easton, is reasonable, as the former involves a joint service, while the latter is a one-line haul. *Dexter Portland Cement Co. v. L. V. R. R. Co.*, 2 P. C. R. 447.

(b) Circumstances may justify upon the same commodity between two points a higher rate in one direction than is charged in the opposite direction. *Rea v. B. & O. R. R.*, et al., 1 P. S. C. Rep. 204.

(c) Where discrimination in train service between two localities is alleged, it must be shown that the locality complaining requires additional service before its installation will be ordered. *Fiscus v. P. & R. Ry. Co.*, 2 P. C. R. 252.

**B. BETWEEN CONNECTING CARRIERS.** (a) The practice of requiring prepayment of freight by one connecting carrier and not by another, is discriminatory. *Wadley Southern R. Co. v. Georgia*, 137 Ga. 497, 73 S. E. 741, affirmed in 235 U. S. 651, 59 L. Ed. —; *Adams Ex. Co. v. State*, 161 Ind. 328, 67 N. E. 1033. *Contra*, *Gulf, C. & S. F. R. Co. v. Miami S. S. Co.*, 30 C. C. A. 142, 52 U. S. App. 732, 86 Fed. 407; *Cf. A., T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S. 668, 28 L. Ed. 292, 4 Sup. Ct. 185.

(b) Where a railroad company accepts cars from three connecting lines at interchange points within its switching limits and delivers them to industries within those limits, it cannot refuse to accept cars offered by a fourth carrier at an equally convenient interchange point. *Pennsylvania Co. v. U. S.*, 214 Fed. 445, affirmed in 236 U. S. 351, 59 L. Ed. —; *Louisville & N. R. Co. v. U. S.*, U. S. Adv. Ops. 1914, 696, 59 L. Ed. —; affirming 216 Fed. 672.

(c) The allowance of a portion of a joint rate to a carrier for carrying its own property over its own line, is discriminatory. *Rio Grande & E. P. Ry. Co. v. R. R. Com. (Tex.)*, 175 S. W. 1116.

**C. BETWEEN INDIVIDUALS. I. Practices held Discriminatory.** (a) Where a respondent telephone company furnished service to hotels and railway stations free, and to its stockholders at a reduced rate, it contended that the latter practice was necessary in order to sell its stock and to extend its lines into new territory. Held, (1) The Public Service Company Law makes no distinction between stock companies and others, and the reduced rates to stockholders constitute "discrimination" and are forbidden. (2) The furnishing of free service to hotels, etc., is likewise discriminatory, and is forbidden. *Somerset Tel. Co. v. Economy Tel. Stock Co.*, 1 P. C. R. 223.

(b) A refusal to grant a siding connection to the proprietor of a coal mine is an undue and unlawful discrimination. *Cox v. P. R. R. Co.*, 240 Pa. 27, 87 Atl. 581.

(c) Granting of free or reduced fares for transportation to ministers of the gospel is discriminatory. *Administrative Ruling No. 2*, 1 P. C. R. 97. Free transportation of municipal officers by a street railway company is forbidden. In *re Free Transportation, etc.*, 2 P. C. R. 126. See Art. III, Sec. 9 (b).

(d) The granting of a lower rate on coal hauled in producer's cars than for that hauled in carrier's cars gives an undue and unlawful advantage to consignees receiving the lower rate, and gives an unlawful power to the producer to discriminate by determining which of the consignees shall receive shipments in producer's cars. *Penna. Rubber Co. v. P. R. R. Co.*, 2 P. C. R. 31.

(e) Where a railroad operated a six mile branch line for the use of one consignee and refused service to the public generally on the ground that such service would be unremunerative, the Commission ordered the erection of a public siding and a non-agency station, so as to serve all without discrimination. *Blough v. B. & O. R. R. Co.*, 2 P. C. R. 84.

(f) Supplying tungsten lamps free to one customer is a discrimination in his favor. *Good Shepherd Home v. Lehigh Valley L. & P. Co.*, 2 P. C. R. 187.

(g) The refusal to deliver shipments of which consignee was the bailee and not the owner is a discrimination, where no such distinction is drawn in the case of other consignees. *Missouri, K. & T. Ry. Co. v. Seeger (Tex.)*, 175 S. W. 713.

(h) A clause in a shipping contract whereby the shipper waives any rights which he may have to damages under prior contracts is discriminatory by reason of the fact that the rights waived may be of different value. *J. W. Stewart & Son v. Chi., R. I. & P. Ry. Co. (Ia.)*, 151 N. W. 485.

(i) The carrying of a passenger to a given destination over a longer route at the rate applicable to a shorter route, is a discrimination. *Ligon v. St. L. & S. F. R. Co. (Mo.)*, 168 S. W. 647.

(j) An agreement by a carrier that a shipment shall be forwarded to a foreign port by a line with which it has no published through rates, and at a specified sum, is discriminatory, since any difference in the rates would have to be paid out of the earnings of its own line. *J. H. Hamlen & Sons Co. v. Ill. Cent. R. Co.*, 212 Fed. 324.

**II. Practices held Not Discriminatory.** (a) The issuance of free passes to officers and employees of railroad companies to be used for transportation of dependent members of their families, is not discriminatory. *Administrative Ruling No. 1*, 1 P. C. R. 68. Granting free transportation to policemen and firemen in the discharge of their duties, is not discriminatory. *Id.* See Art. III, Sec. 9 (b).

(b) In the operation of an inclined plane the service performed for a customer with a vehicle is of more value, and the expense to the company in rendering the service is greater, for an "up" than for a "down" trip, and the practice of the respondent in charging a higher rate for an "up" than a "down" trip, is reasonable and lawful. *Geer v. Cambria Inclined Plane Co.*, 2 P. C. R. 455.

(c) A company is not required to renew a contract which does not conform to its tariffs filed, merely because other contracts for definite terms of years, which do not conform to said tariffs, are in effect. *Norwich Tel. Co. v. Bell Tel. Co.*, 2 P. C. R. 466.

(d) It is not discriminatory to refuse transfers from one line of street railway to another, where it is shown that they proceed over practically the same routes to terminal points a few blocks apart and that the granting of transfers in all similar cases on the system would delay traffic. *27th Ward Prog. Club v. Pittsburgh Ry. Co.*, 2 P. C. R. 585.

(e) A company may, by rules properly filed with the Commission, provide for the allowance of discount for prompt payment of bills, but such rules must be applied to all patrons alike. *In re Allowance of Discount*, 2 P. C. R. 127; *Administrative Ruling No. 6*, 2 P. C. R. 386; *Good Shepherd Home v. Lehigh Valley L. & P. Co.*, 2 P. C. R. 187. See Art. III, Sec. 1, (c) ante.

(f) The charging of a different rate for inter-plant movements of cars made by the carrier's power and those made by individual power, is not discriminatory. The two movements differ materially in character. *Crucible Steel Co. v. P. R. R. Co.*, 2 P. C. R. 599; *Same v. Same*, 1 P. C. R. 49.

(g) An agreement with a particular shipper to expedite a shipment at regular rates, is a discrimination. *Johnson v. N. Y., N. H. & H. R. Co.*, 88 Atl. 988, 991; *J. H. Hamlen & Sons Co. v. Ill. Cent. R. Co.*, 212 Fed. 324.

(h) A feeding in transit privilege, uncertain as to time, is valid if allowed to all shippers. *Klink v. Chi., R. I. & P. Ry. Co.*, 219 Fed. 457.

Section 9. It shall be unlawful for any common carrier—

(a). To charge or receive any greater compensation, in the aggregate, for the conveyance of passengers or property of the same class for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance;<sup>10</sup> or, unless specially authorized by the commission,<sup>11</sup> to charge any greater compensation as a through rate than

(i) The duty which public service companies owe to the public to deal with all equally and without discrimination does not prevent a railroad from granting to one person the exclusive privilege of soliciting the carriage of baggage on its premises. *Denton v. Tex. & P. Ry. Co.*, 160 S. W. 113; *Rose v. Pub. Ser. Com. (W. Va.)*, 83 S. E. 85; *G. A. Rupert v. L. V. R. R. Co.*, 1908 Pa. R. Com. Rep. 25.

(j) The duty of a company to deal with all without discrimination does not require the making of an expensive extension of facilities in order to supply one consumer. *Watson v. French (Me.)*, 92 Atl. 290.

**D. EFFECT OF FILING RATES.** (a) Rates filed and published are binding on shipper and carrier, and a mistake in quoting a rate does not relieve a shipper from paying the legal rate. *Central of Ga. Ry. v. Curtis (Ga.)*, 82 S. E. 318; *Virginia-Carolina Peanut Co. v. Atl. C. L. R. Co. (N. Car.)*, 82 S. E. 1. See also note 33, (c) ante.

(b) A contract executed or executory, for a rate different from the published rate, is void. *Central of Ga. Ry. v. Curtis (Ga.)*, 82 S. E. 318.

10. (a) The granting of a rebilling privilege whereby shippers, after goods are received at N. are permitted to reship same to points further south, and receive an allowance on the rate which makes the entire rate equal to what it would have been if the shipment would have been continuous, is a violation of the long and short haul clause. *U. S. v. Louisville & N. R. Co.*, 235 U. S. 314, 59 L. Ed. —.

(b) Where the class rate charged from an intermediate point, where no commodity rate is in effect, is higher than the commodity rate from a more distant point on the same line to the same destination, the charging of the class rate violates this clause. The fact that no commodity rate is in effect at the intermediate point does not justify the rate charged. *Birkle v. N. Y. C. & H. R. R.*, 1 P. C. R. 71, 1 P. S. C. Rep. 203; *Moltz Bros. v. Same*, 1 P. S. C. Rep. 202; *Stevenson, Sperring Co. v. Same*, 1 P. S. C. Rep. 205; *Centre Brick & Clay Co. v. Same*, 1 P. S. C. Rep. 206; *Patton Clay Mfg. Co. v. Same*, 1 P. S. C. Rep. 206; *Reese-Sheriff Lumber Co. v. Same*, 1 P. S. C. Rep. 213; *Furst v. Same*, 1 P. S. C. Rep. 224; *Patchin v. Same*, 1 P. S. C. Rep. 224. It was to meet this situation that General Order No. 7, 1 P. C. R. 121, 183; 1 P. S. C. Rep. 454, and Conference Ruling No. 2, 2 P. C. R. 101, were made. See also Report of Bureau of Rates and Tariffs, 1 P. S. C. Rep. 435.

11. The power given to the commission is not an unconstitutional dele-

the aggregate of the intermediate rates,<sup>12</sup> but this shall not be construed as authorizing any common carrier to charge and receive as great a compensation for a shorter as for a longer distance: Provided, however, That nothing in this section contained shall prohibit common carriers from establishing reasonable zone systems of charges.<sup>13</sup>

(b). To knowingly assist, suffer, or permit any person or corporation to obtain transportation for any passengers or property between points within this Commonwealth at less than the rates established by such common carrier, or by order of the Commission, by means of false billing, false classification, false weight or weighing, or false report of weight, or by any other means or device whatsoever.<sup>14</sup>

Any common carrier may, however, issue at special rates of fare, excursion and commutation tickets;<sup>15</sup> but, before any common carrier may issue any such excursion or commutation tickets, it shall file with the Commission and shall post, in the same manner as required by this act in the case of other rates or charges, copies of the tariffs or schedules of the rates, fares, or charges

gation of legislative authority. *United States v. A., T. & S. F. R. Co.*, 234 U. S. 476, 58 L. Ed. 1408.

12. *Adrian Furnace Co. v. P. R. R. Co.*, 2 P. C. R. 632.

13. (a) Carriers may maintain a schedule of reasonable fares changing with stations instead of being based upon mileage. Such a schedule would be a modified zone system of fares. *Combined Committee, etc., v. P. R. R. Co. et al.*, 2 P. C. R. 717, 722.

(b) The dividing lines of zones cannot always be at uniformly equal distances apart, nor exact distances be fixed as the length of ride for one unit of fare. In determining the reasonableness of a zone system the controlling features are the relative locations of the centers of manufacturing, business, shopping and population of the districts, with the origins and destinations of the greatest proportion of travel. *Council of Middlesex v. Republic Ry. & L. Co.*, 1 P. S. C. Rep. 164.

(c) The fact that a destination is but little beyond the first zone does not entitle the haul to a reduction of the second zone rate. *Kelley v. City Transfer Co.*, 1 P. S. C. Rep. 210.

14. See Art. III, Sec. 8, (a) and (b), and Sec. 9 (a), ante.

15. In the matter of the sale of commutation and term tickets before the date of the initial trip. *Administrative Ruling No. 7*, 2 P. C. R. 650.

on which such tickets are to be based and issued;<sup>16</sup> and any common carrier may grant free passes or passes at a discount, to any officer or employee of such carrier.<sup>17</sup> Nothing in this act shall be construed to prevent telephone, telegraph, express, or railroad corporations from entering into contracts with each other for the exchange of service at free or reduced rates, which contracts however shall be filed with the Commission.

Section 10. It shall be unlawful for any telephone or telegraph corporation, or person or persons engaged in like business, to charge or receive any greater compensation in the aggregate, [\*1395] for the transmission \*of any message or conversation for a shorter than for a longer distance over the same line or route, in the same direction, the shorter being included within the longer distance; or, unless specially authorized by the Commission, to charge any greater compensation as a through rate than the aggregate of the intermediate rates; but this shall not be construed as authorizing any such telephone or telegraph corporation, person or persons engaged in like business, to charge and receive as great a compensation for a shorter as for a longer distance. Upon application, the Commission may in special cases, after investigation, authorize such telephone or telegraph corporation, or person or persons engaged in like business, to charge less for a longer than for a shorter distance, but the order must specify and prescribe the extent to which relief from the operation of this section is

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16. In re notice of change in tariffs or schedules in the matter of fares for excursions limited to certain designated periods. **General Order No. 4, 1 P. C. R. 67.**

17. Free passes may be issued for transportation of dependent members of the families of such officers and employees, and to policemen and firemen in the discharge of their public duties, **Administrative Ruling No. 1, 1 P. C. R. 68**; and to contractors, their men, material and tools, equipment and supplies, in and about the performance of work being done by the contractor for the carrier, **Administrative Ruling No. 3, 2 P. C. R. 99**; but may not be issued to ministers of the gospel, **Administrative Ruling No. 2, 1 P. C. R. 97**; nor to charitable organizations, **Administrative Ruling No. 4, 2 P. C. R. 100**. Father of an adult employee, not living with him, nor supported by him, is not a "dependent member" of the family. *Wentz v. Chi., B. & Q. R. Co. (Mo.)*, 168 S. W. 1166. Free transportation of municipal officers is forbidden. In re Free Transportation, etc., **2 P. C. R. 126.**

given:<sup>18</sup> Provided, That nothing in this section contained shall prohibit telephone or telegraph corporations from establishing reasonable zone systems of charges.

Section 11. No contract or agreement between any public service company and any municipal corporation shall be valid unless approved by the Commission:<sup>19</sup> Provided, That, upon notice

18. See Rules of Practice and Procedure, Rule 30. 2 P. C. R. 21.

19. Full report of Applications for Approval of Municipal Contracts from July 26, 1913, to June, 1914. 1 P. S. C. Rep. 249-326.

See also Art. V, Sec. 18, post.

**A. PRACTICE.** (a) See Rules of Practice and Procedure, Rule 36. 2 P. C. R. 27.

(b) Where the contract is one providing for the construction of crossings, the approval of the contract and the approval of the construction should be sought in separate proceedings. In such case the contract will be approved if the interests of the public are provided for and Rule 36 of the Rules of Practice has been complied with. The plans for the crossing, etc., will be considered in a separate proceeding. *Application of Supervisors of Concord Twp.*, 2 P. C. R. 590.

(c) Where a portion of a contract was void because ultra vires, the remainder was approved. *Application of People's Nat. Gas Co.*, 2 P. C. R. 620.

**B. WHEN APPROVAL IS NECESSARY.** (a) Where, prior to July 26, 1913, substantially all things were done by a borough to render a franchise ordinance valid, the approval of the Commission is not required. *Application of Raystown Water Power Co.*, 2 P. C. R. 483.

(b) An ordinance granting a public service company the right to construct its facilities across a street in a municipality in order to render service in territory beyond, when accepted by the company, constitutes a contract, and must be approved by the Commission. *Petition of Lehigh Nav. Elec. Co.*, 2 P. C. R. 413.

**C. CONSIDERATIONS AFFECTING APPROVAL. I. Competition.** (a) Before a contract will be approved it must be established that the desired service is necessary and proper for the accommodation, safety or convenience of the public. The Commission will not permit competition, nor take such steps as to invite it, unless the area and population to be served, the needs of the community, or the prospects of the municipality, as based upon its growth and development, reasonably show that the public welfare demands it. In doubtful cases the line will be drawn against rather than in favor of competition. *Schuylkill L., H. & P. Co.'s Petition*, 1 P. C. R. 122; *Application of Harmony Electric Co.*, 2 P. C. R. 42; *Borough of Exeter's Petition*, 2 P. C. R. 52; *Borough of Avoca's Petition*, 2 P. C. R. 372; *Petition of Lehigh Nav. Elec. Co.*, 2 P. C. R. 413; *Petition of Twp. of Jenkins*, 2 P. C.



R. 680; *Petition of East End Elec. L., H. & P. Co.*, 2 P. C. R. 714. For full discussion of the effects of competition, see *Idaho Power & Light Co. v. Blomquist (Idaho)*, 141 Pac. 1083.

(b) But where a company which has been supplying street lighting for a borough, refuses, upon the expiration of its contract, to enter a bid for continuance of such service, the Commission will approve a contract with a competing company. *Borough of Exeter's Petition*, 2 P. C. R. 60.

(c) Artificial and natural gas are essentially different commodities, and the Commission will not restrain competition between them. *Application of People's Nat. Gas Co.*, 2 P. C. R. 680.

II. **Judgment of Local Authorities.** (a) The Commission, in determining questions affecting the interests of municipalities, gives much weight to the conclusions reached by their officers charged with the duty of protecting their interests. Where nine of twelve councilmen approved an ordinance granting a franchise for the extension of the line of a street railway company, and other evidence showed a necessity for the extension, the Commission granted its approval. *Petition of Phoenixville, &c., Ry. Co.*, 2 P. C. R. 191; *Cf. Application of Raystown Water Power Co.*, 2 P. C. R. 483.

(b) Whether a contract was awarded to the lowest responsible bidder, within the meaning of legislation relating to advertisement and competitive bidding upon municipal contracts, is purely a legal question for the courts rather than for the Commission. *City of Pittston's Petition*, 2 P. C. R. 105. Municipal authorities are required by statute to follow certain general methods of procedure in the purchasing of supplies or awarding of contracts, but they are allowed to exercise reasonable discretionary powers in deciding upon the final action to be taken. *Id.* Such discretion has not been abused in awarding a contract for street lighting to a company that has furnished satisfactory service for years, when the competing company would require four months time to provide necessary facilities, when it was uncertain whether light could be obtained during the interval, and when the difference in the amount of the bids was small. *Id.*

III. **Bona Fide Investment prior to July 26, 1913.** Where, upon application made for the Commission's approval of franchise contracts with a number of municipalities, it appeared that the applicant had a legal right to furnish service in one borough and the adjacent territory, having acquired such right prior to July 26, 1913; that it had proceeded with the construction of its plant in good faith and had constructed lines in other boroughs under ordinances duly passed prior to July 26, 1913, but not effective until after said date by reason of their not having been posted and published; that it had made an investment of \$53,094.45 before its rights were questioned; the contracts were approved. *Slate Belt Tel. & Tel. Co. v. Blue Mt. Tel. & Tel. Co.*, 2 P. C. R. 403.

to the local authorities concerned, any public service company may apply to the Commission, before the consent of the local authorities has been obtained, for a declaration by the Commission of the terms and conditions upon which it will grant its approval of such contract or agreement, if at all.

Section 12. Every public service company shall be entitled to the full enjoyment and exercises of all and every the rights, powers, and privileges which it lawfully possesses, or might possess, at the time of the passage of this act, except as herein otherwise expressly provided.<sup>20</sup>

The several duties, rights, powers, and limitations of rights and powers of public service companies, as enumerated in article two and this article three, respectively, or contained in any of the pro-

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**IV. Legality of the Contract.** Whether a bid advertised contained a clause or specification not strictly in accord with the letter of the law, is a juridical rather than an administrative question, and is not within the jurisdiction of the Commission. *Application of Raystown Water Power Co.*, 2 P. C. R. 483. But where the contract is made upon an express condition which is not contained in the advertisement for bids, the Commission must determine administratively the legality of the contract as a condition precedent to the granting of its approval, and having found that the contract was illegal and void, the Commission must withhold its approval. *Petition of the City of Williamsport*, 2 P. C. R. 639.

**V. Capacity of the Parties.** Where the Commission finds a corporation furnishing service under an accepted right, it will not inquire into the authority of the corporation under its charter, nor the legality of a merger by which it claims to have acquired that right. *Borough of Avoca's Petition*, 2 P. C. R. 372.

20. (a) See note 19, C, III, *supra*.

(b) A company incorporated prior to the approval of the Public Service Company Law has the right to begin the exercise of its rights and powers without the approval of the Commission, even though it did not exercise said rights until after the Law went into effect. *Penna. Utilities Co. v. Lehigh Nav. Elec. Co.*, 2 P. C. R. 74, affirmed in 2 P. C. R. 422.

(c) A franchise with a street railway company providing that rates charged shall not exceed 5c, does not constitute a contract suspending the governmental power of regulation during the life of the franchise. *Portland Ry. Light & Power Co. v. City of Portland*, 210 Fed. 667; *Same v. Same*, 201 Fed. 119; *Milwaukee Elec. Ry. & L. Co. v. R. R. Com.*, 142 N. W. 491, 153 Wis. 592, Ann. Cas. 1915 A, 911, affirmed in U. S. Adv. Ops. 1914, 820, 59 L. Ed. —.

visions of this act; or the performance, exercise, or enforcement thereof by, or in favor of, or against, any public service company, shall, in every proper case, be subject to section twelve of article sixteen, sections one and four of article seventeen of the Constitution of the Commonwealth, and to any other applicable provisions of the Constitution of the Commonwealth or of the United States.

[\*1396]

## \*ARTICLE IV.

## Constitution of Commission.

Section 1. For the purpose of regulating public service companies and of carrying out the provisions of this act, an administrative body or Commission is hereby established, to be known as The Public Service Commission of the Commonwealth of Pennsylvania; and in that name it shall issue its orders and certificates, and may become or be made a party to legal proceedings. It shall have an official seal, which shall be prepared and furnished by the Secretary of the Commonwealth, with the words "The Public Service Commission of the Commonwealth of Pennsylvania," and such other design as the Commission may prescribe, engraved thereon, by which seal it shall authenticate its proceedings, and of which seal the court shall take judicial notice.

Section 2. This Commission shall consist of seven members, who shall be appointed by the Governor, by and with the advice and consent of the Senate. Each Commissioner at the time of his appointment and qualification shall be a resident of the Commonwealth of Pennsylvania, and shall have been a qualified elector therein for a period of at least one year next preceding his appointment, and shall also be not less than thirty years of age.

The commissioners first appointed under this act shall continue in office for the terms of four, five, six, seven, eight, nine, and ten years, respectively, from the first day of July, Anno Domini one thousand nine hundred and thirteen, and until their respective successors shall be duly appointed and shall have qualified, but their successors shall each be appointed for a term of ten years.

A member of said Commission designated by the Governor shall during his term of office be the chairman of the Commission. The chairman shall, when present, preside at all meetings, and in his absence the member whose term shall first expire shall preside.

Section 3. When a vacancy shall occur in the office of any commissioner, a commissioner shall, in the manner aforesaid, be appointed for the residue of the term. If the Senate shall not be in session when this act is approved, or when any vacancy occurs, the original appointments, or any appointment made by the Governor to fill a vacancy, shall be subject to the approval of the Senate when convened.

A quorum of the Commission shall be four members, who, for all purposes, including the making of any order, or the ratification [\*1397] of any act done or order \*made by one of more of the commissioners, must act unanimously.

No vacancy in the Commission shall impair the right of a quorum of the commissioners to exercise all the rights and perform all the duties of the Commission.

Section 4. Any investigation, inquiry, or hearing which the Commission has power to undertake or hold may be undertaken or held by or before any one *or more* of the commissioners, upon condition, however, that such commissioner *or commissioners* shall have been authorized by the Commission to undertake or hold such investigation, inquiry, or hearing. All investigations, inquiries, or hearings, before or by any such commissioner *or commissioners*, shall be, and be deemed to be, the investigations, inquiries, and hearings of the Commission. Any determination, ruling, or order of a commission *or commissioners*, upon any such investigation, inquiry, or hearing undertaken or held by him *or them*, shall not become and be effective until approved and confirmed by at least a quorum of the Commission and ordered to be filed in its office. Upon such confirmation and order, such determination, ruling, or order shall be the determination, ruling, or order of the Commission. *In any investigation, inquiry, or hearing now pending, or which may hereafter be instituted, the Commission is hereby authorized to employ a special agent or examiner, who shall have power to administer oaths, and examine witnesses, and receive evidence in any locality which the Commission, having regard to the public convenience and the proper discharge of its functions and duties, may designate. The testimony and evidence so taken or received shall have the same force and effect as if taken or received by the Commission, or any one or more of*

*the commissioners, as above provided. [Italics added by amendment of June 3, 1915.]*

Section 5. The Commission shall have a secretary to be appointed by it, and to hold office at its pleasure. It shall be the duty of the secretary to keep a full and true record of all the proceedings of the Commission, and of all determinations, rulings, and orders made by the Commission or by any of the commissioners, and of the approval and confirmation by the Commission of determinations, rulings, or orders made by individual members thereof.

The secretary shall be the custodian of the records of the Commission, and file and preserve at its general office all books, maps, profiles, tariffs, schedules, reports, and documents, and papers whatsoever, filed with it or entrusted to its care, and shall be responsible to the Commission for the same.

Under the direction of the Commission the secretary shall be its chief executive officer, have general charge of its general office, superintend its clerical business, conduct its correspondence, give notice of all determinations, rulings, and orders of the Commission, prepare for service such papers and notices as may be required of him by the Commission, and perform such other duties as the Commission may prescribe.<sup>21</sup> He shall have power and authority to administer oaths, in all parts of the Commonwealth, in all proceedings by or before the Commission or any commissioner and in all cases or matters appertaining to the duties of his office.

[\*1398] \*The secretary shall have power to designate, from time to time, one of the clerks appointed by the Commission to perform the duties of the secretary during his absence, and the clerk so appointed shall possess, for the time designated, the powers of the secretary of the Commission.

The secretary shall be the disbursing officer of the Commission, subject to the approval of the Commission, with respect to both requisitions and expenditures, and before entering upon the duties of his office he shall file in the office of the Secretary of the Commonwealth a bond to the Commonwealth, with corporate security in the sum of ten thousand dollars, to be approved by the Governor, conditioned for the faithful performance of his official duties.

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21. See Rules of Practice and Procedure, Rule 3. 2 P. C. R. 3.

Section 6. The Attorney General shall ex officio be the general counsel of the Commission. He shall appoint two attorneys, who shall be learned in the law, as counsel and assistant counsel, respectively, for the Commission. The said counsel or assistant counsel shall attend the hearings before the Commission or a commissioner, conduct the examination of witnesses when requested so to do by the Commission or a commissioner, represent the Commission upon appeals and other hearings in the Courts of Common Pleas and in the Superior and Supreme Courts, or other courts of the Commonwealth of Pennsylvania, or in any Federal court, and in actions instituted to recover penalties and to enforce orders of the Commission. Said counsel and assistant counsel shall also assist the Attorney General in conducting all mandamus, injunction, and quo warranto proceedings, at law or in equity, instituted by him for the enforcement of the determinations, rulings, and orders of the Commission, and shall perform such other professional duties as may be required of them, or either of them, by the Commission.

Section 7. The Commission shall appoint a marshal, to serve during its pleasure. He shall attend the hearings of the Commission, preserve order thereat; superintend the serving of subpoenas, orders of the Commission, and such other papers as the Commission may direct; make such reports and perform such other duties as may be prescribed by the Commission.

Section 8. The Commission shall appoint an investigator of accidents, whose duty it shall be to have charge of the investigation of—and to investigate, subject to the orders and direction of the Commission—the cause of any accident in or about, or in connection with, the operation of the property, facilities, or service of [\*1399] any public service company, wherein \*any person shall have been killed or injured, or property shall have been destroyed or injured, which may be assigned to him for investigation by the Commission, or of the happening of which he may by due diligence obtain knowledge, and to make a full and complete report thereon to the Commission; and also to report to the Commission, whether any public service company has failed to perform the duties prescribed by article two, section one (x), of this act, with relation to accidents of the happening of which, in the exercise of due diligence, he may obtain knowledge; and also to collate and

tabulate all data, statistics, and other pertinent information for the use of the Commission, obtained by him as the result of such investigations; and to make an annual report of such investigations to the Commission, with recommendations as to means or methods whereby such accidents may be averted;<sup>22</sup> and to perform all such other duties concerning said accidents as to the Commission may seem advisable for the promotion of the safety of patrons and employees of public service companies and of the safety and welfare of the public. Such reports, statistics, data, or information shall not be open for public inspection, except by order of the Commission, and shall not be admitted in evidence for any purpose in any suit for damages growing out of any matter or thing mentioned therein.

Section 9. The Commission shall have power to employ during its pleasure, and at such rates of compensation as it may determine, such officers, experts, engineers, statisticians, accountants, inspectors, clerks, and employees as it may deem necessary to carry out the provisions of this act, or to perform the duties and exercise the powers conferred upon the Commission.

Section 10. Each of the commissioners shall receive an annual salary of ten thousand dollars, except the chairman, who shall receive an annual salary of ten thousand five hundred dollars.

The secretary shall receive an annual salary of five thousand dollars.

The counsel for the Commission shall receive an annual salary of seven thousand five hundred dollars.

The assistant counsel for the Commission shall receive an annual salary of five thousand dollars.

The marshal shall receive an annual salary of two thousand dollars.

The investigator of accidents shall receive an annual salary of five thousand dollars.

The salaries hereinbefore mentioned, and the salaries of all other officers, agents, appointees, and employees of the Commission, shall be payable monthly.

[\*1400] \*Each member of the Commission, its secretary, attorneys, marshal, and investigator of accidents, and other officers,

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<sup>22</sup>. Annual Report of Investigator of Accidents—1 P. S. C. Rep., Appendix "J," pp. 401-428.

agents, employees, and appointees, shall be paid, in addition to their stipulated salary or compensation, the railroad fare, board, lodging, and other traveling expenses necessary and actually incurred by each of them in the performance of the duties required by this act, or performed by direction of the Commission.

Section 11. The salaries, when properly certified by the secretary of the Commission, shall be audited by the Auditor General, and when audited and allowed shall be paid out of moneys specifically appropriated for that purpose, by warrants drawn therefor by the Auditor General upon the State Treasurer.

All disbursements of such a nature as to make it impracticable for the Commission to file with the Auditor General itemized receipts or vouchers prior to the advance by the accounting officers of funds sufficient to meet such expenses shall be paid out of money specifically appropriated for that purpose, in the manner provided by an act, entitled "An Act prescribing the method for disbursing and accounting for certain appropriations to the departments, bureaus, commissions, and other branches of the State Government," approved April twenty-third, Anno Domini one thousand nine hundred and nine.

The moneys necessary to carry this act into effect shall be appropriated to the Commission biennially, as an item in the general appropriation bill.

Section 12. No person shall be appointed a member of the Commission, or hold any place, position, or office under it, who occupies any official relation to any public service company doing business in this Commonwealth, or who holds any other appointive or elective office of the Commonwealth or any municipality thereof. No commissioner shall during his term be a candidate for any such office.

No commissioner, and no employee, appointee, or official engaged in the service of, or in any manner connected with, said Commission, shall hold any office or position, or be engaged in any business, employment, or vocation, the duties of which are incompatible with the duties of his office or employment as commissioner, or in the service or in connection with the work of the Commission. No commissioner shall participate in any hearing or proceeding in which he has any direct or indirect pecuniary interest. Every commissioner, the said secretary, attorneys, mar-



shal, and investigator of accidents, and every individual employed or appointed to office under, in the service of, or in connection with the work of, the Commission, is hereby forbidden to solicit, suggest, request, or recommend, directly or indirectly, to any public service company, or to any officer, attorney, agent, or employee thereof, the appointment of any individual to any office, place, or position in, or the employment of any individual in any capacity by, said public service company.

Section 13. Every public service company, and every officer, attorney, agent, or employee thereof, is hereby forbidden to offer to any commissioner, the said secretary, attorneys, marshal, or investigator of accidents, or to any person appointed or employed by the commissioner, any office, place, appointment, or position; or to offer to give any commissioner, the said secretary, attorneys, marshal, or investigator of accidents, or to any person employed in the service of the Commission or in connection with the work of the Commission, any free pass or transportation, or any reduction in fares to which the public generally is not entitled, or any free carriage of property, or any present, gift, or gratuity, money or valuable thing of any kind.

Section 14. If the secretary, marshal, or investigator of accidents, or any person employed or appointed in the service of the Commission, shall violate any provision of this act, the Commission shall forthwith remove him from the office or employment held by him.

Section 15. The Governor, by and with the consent of the Senate, may remove any commissioner, or any of the counsel to the Commission, for inefficiency, neglect of duty, or misconduct in office, giving him a copy of the charges against him, and affording him an opportunity to be publicly heard, in person or by counsel, in his own defense, upon not less than ten days' notice. If such commissioner shall be removed, the governor shall file in the office of the Secretary of the Commonwealth a complete statement of all charges made against such commissioner, and his finding thereon, together with a complete record of the proceedings.

Section 16. Each commissioner, the said secretary, attorneys, marshal, and investigator of accidents, shall qualify, before entering upon the duties of their respective offices or appointments, by taking and subscribing before the Secretary of the Common-

wealth the oath prescribed by article seven of the Constitution of this Commonwealth.

Section 17. The principal office of the Commission shall be in the City of Harrisburg, in such rooms in the capitol building or other public building as may be designated by the Board of Commissioners of Public Grounds and Buildings.<sup>23</sup>

[\*1402] \*Section 18. The Commission, or a quorum thereof, shall hold stated meetings at least twice a month during the year, at its principal office, and may hold meetings at any time and at any place within this Commonwealth.<sup>24</sup>

Section 19. The Board of Commissioners of Public Grounds and Buildings shall, upon requisition of the secretary of the Commission, furnish the Commission with such books, stationery, furniture, and supplies as may be needed properly to conduct the affairs of the Commission.

The printing and binding necessary for the proper performance of the duties of the Commission, or the proper preservation of books, documents, and papers filed with the Commission, shall be done by the State Printer, upon the order of the Superintendent of Public Printing and Binding, upon requisition of the secretary of the Commission.

Section 20. The principal office of the Commission at Harrisburg shall be open for business, between the hours of nine ante meridian and five post meridian, every business day in the year, and one or more responsible persons, to be designated by the Commission, or by the secretary under the direction of the Commission, shall be on duty at all times, in immediate charge thereof.

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23. See Rules of Practice and Procedure, Rule 1. 2 P. C. R. 3.

24. See Rules of Practice and Procedure, Rule 2. 2 P. C. R. 3.

## ARTICLE V.

Powers and Duties of Commission.<sup>25</sup>

Section 1.<sup>26</sup> The Commission shall have general administrative power and authority, as provided in this act, to supervise and regulate all public service companies doing business within this Commonwealth.<sup>27</sup>

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25. (a) The legislature of a state does not delegate its legislative power by merely providing an agency for carrying out its legislative scheme with respect to public service corporations. *Manufacturers' L. & H. Co. v. Ott*, 215 Fed. 940; *I. C. C. v. Goodrich Transit Co.*, 224 U. S. 194, 32 Sup. Ct. 436, 56 L. Ed. 729.

(b) The legislature cannot delegate its purely legislative power to a commission; but, having laid down the general rules of action under which a commission shall proceed, it may require that commission to apply such rules to particular cases. *Idaho Power & Light Co. v. Blomquist* (Idaho), 141 Pac. 1083, 1092; *I. C. C. v. Goodrich Transit Co.*, supra.

26. This section is a general outline of the powers of the Commission. The later sections of this article specify in detail the extent of the powers to be exercised. The index should be consulted, therefore, and the particular section dealing with the matter in hand should be examined.

27. (a) The states may, in the exercise of their police power, make reasonable regulations and may enforce them against one engaged in interstate commerce, even though it indirectly interfere with such commerce. But the state cannot impose burdens which amount directly to a regulation of it. *Welch v. Dean* (Mont.), 141 Pac. 548; see also *State v. Northern Ex. Co.* (Wash.), 141 Pac. 757. The police power is sufficiently broad to enable the legislature to regulate public utilities in order to promote the health, safety and welfare of society. *Idaho Power & Light Co. v. Blomquist* (Idaho), 141 Pac. 1083.

(b) By granting a franchise to a public service company the state does not abrogate its right to exercise the police power of the state over it. It may regulate the manner in which the franchise shall be exercised. *Idaho Light & Power Co. v. Blomquist* (supra).

(c) For a refusal by a municipality to permit street cars to stand on tracks at terminal points within the municipality, the remedy is in the courts, not by complaint to the Commission. *In re Use of Streets, &c.*, 2 P. C. R. 127. A city has the right to make reasonable regulations governing the use of its streets by street railway companies. *Bain v. Ft. Smith Light & Traction Co.* (Ark.), 172 S. W. 843.

(d) The power to regulate a public utility is corollary to the duty to protect its property and the interests of the public and investors from unnecessary and ruinous competition. *Application of Harmony Electric*

Said power and authority shall include the power to inquire into and regulate the service, rates,<sup>28</sup> fares, tolls, or charges of any and all public service companies, including individual and joint rates;<sup>29</sup> the charges for long and short transmission of messages and conversations by telegraph and telephone companies; the making of repairs, alterations, and improvements in and to such service; as shall be reasonably necessary for the accommodation or safety of its patrons, employees, and the public; the granting of transfers to or from one part of the system of the same common carrier to another part; the routing of the lines of street railways, under the provisions of the act, entitled "An act authorizing traction or motor power companies, and street passenger railway companies, owning, leasing, controlling, or operating different lines of street railways, to operate all of said lines as a general system, and to lay out such new routes or circuits over the [\*1403] \*whole or any part of any street or streets occupied by such different companies, and to run cars thereon for such distances and in such directions as will, in the opinion of the operating company, best accommodate public travel," approved the fifteenth day of May, Anno Domini one thousand eight hundred and ninety-five (Pamphlet laws, sixty-five), or otherwise; the just and equitable distribution of trains, cars, vehicles, and motive power, or other facilities, of all common carriers; the granting, construction, operation, or discontinuance of switches, sidings, and crossings; the construction, operation, or discontinuance of switch connections with or between lines of railroad corporations; the location or abolition of freight and passenger stations,<sup>30</sup>

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Co., 2 P. C. R. 42; Borough of Exeter's Petition, 2 P. C. R. 52; Borough of Avoca's Petition, 2 P. C. R. 372; Cf. Petition of Twp. of Jenkins, 2 P. C. R. 680; Petition of East End Elec. L., H. & P. Co., 2 P. C. R. 714; Idaho Power & Light Co. v. Blomquist (Idaho), 141 Pac. 1083.

28. The Commission may determine the reasonableness of rates although the contracts for service antedated the passage of this act. *Thompson & Hanna Co. v. Erie Co. Elec. Co.*, 2 P. C. R. 199.

29. *Adrian Furnace Co. v. P. R. R. Co.*, 2 P. C. R. 632.

30. (a) For list of cases involving location of stations, station facilities, etc., see subject index in the back of Vols. I and 2 of the Pennsylvania Corporation Reporter and the index to the First Annual Report of the Public Service Commission.

wharves, docks, or piers; the use and compensation for cars owned or controlled by persons other than the carrier; the safety, adequacy, and sufficiency of the facilities, plant, and equipment for the carrying on of their business by said public service companies; the quantity or quality of water, gas, electricity, or light, heat or power, supplied; and, as specifically provided in this act, the issuing of stocks, trust certificates, bonds, notes, or other evidences of indebtedness or other securities by public service companies.

Section 2. Whenever the Commission shall determine, after hearing, had upon its own motion, or upon complaint, as herein-after provided, that the service, facilities, rules, regulations, practices, or classifications of any public service company, in respect to, or in connection with, or employed by, or in the performance of, its public duties within this Commonwealth, are unsafe, inadequate, insufficient, unjust, or unreasonable, the Commission shall determine, and specify by an order in writing to be made and filed as hereinafter provided, and to be served as hereinafter provided upon every public service company to be affected thereby, the just, reasonable, safe, adequate,<sup>31</sup> and sufficient service,<sup>32</sup> facili-

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(b) An act which requires that when two or more railroads reach the same town, they shall be required to build a union depot, if the erection of the same is practicable and feasible, and just and reasonable to the railroads, does not unconstitutionally delegate legislative power by leaving to a commission the power to determine whether the above conditions exist. *Gulf, C. & S. F. Ry. Co. v. State (Tex.)*, 167 S. W. 192.

(c) An order requiring relocation of a station, made after due hearing, does not take property without due process of law, though the cost of building on the new site be greater than that of rebuilding on the old one. *St. Louis, I. M. & S. Ry. Co. v. Bellamy (Ark.)*, 169 S. W. 322.

(d) The primary questions to be considered in the location of a railroad company's yards, tracks or stations, are the safety of the public traveling on the railroad and of that portion of the public having occasion to cross the tracks, and the safety of the employees. While difficulties of operation and cost of construction are factors entitled to consideration, they are necessarily secondary. *Kansas City S. R. Co. v. Redwine (Okla.)*, 143 Pac. 847, 849.

31. The word "adequate" is applicable alike to cases where a carrier has failed to provide any service and where it has failed to provide sufficient service. *Chesapeake & O. Ry. Co. v. Pub. Ser. Com. (W. Va.)*, 83 S. E. 286.

32. (a) See the following **General Orders of the Commission**: No. 1,

1 P. C. R. 46; No. 3, Id. 48; No. 5, Id. 67; No. 6, Id. 97; No. 10, Id. 182; and No. 11, 2 P. C. R. 102; and Administrative Ruling No. 8, 3 P. C. R. —. See Rules and Regulations governing gas, electric, heating and water service, 1 P. C. R. 153-178.

(b) *Mehard v. New Wilmington W. S. Co.*, 2 P. C. R. 272.

(c) Additional train service will not be ordered in the absence of evidence of a public demand for it. *Fiscus v. P. & R. Ry. Co.*, 2 P. C. R. 252. A railroad company operating a six mile branch line for the use of one consignee, will be required to erect a public siding and station, where the accommodation of the public demands it. *Blough v. B. & O. R. R. Co.*, 2 P. C. R. 84. A public service company must render adequate service and make necessary improvements, even though it is not receiving a fair return upon its investment. *Zook v. Turnpike Co.*, 2 P. C. R. 194; *Ernst v. Glenside Water Co.*, 2 P. C. R. 119. But a telephone company should not be required to make an expensive extension of its line unless there is sufficient business in sight to provide a reasonable return upon the investment. *Lehigh Valley Coal Co. v. Bell Tel. Co.*, 2 P. C. R. 441; *Bixler v. United Elec. Co.*, 2 P. C. R. 609.

(d) A state may, in the absence of Congressional regulation, prescribe the style of headlights to be used on locomotives operating on the main lines of a carrier running through that state. *Atl. C. L. R. Co. v. Georgia*, 234 U. S. 280, 58 L. Ed. 1312.

(e) In determining the reasonableness of any branch line service, the relation of the branch to the system as a whole, the needs of the public tributary to the branch, the character of the traffic, the cost of operation, and its effect on the entire system, must be considered, and each factor given weight. The cost of operation is not controlling. *Chesapeake & O. Ry. Co. v. Pub. Ser. Com.* (W. Va.), 83 S. E. 286, quoting *Nelson v. Railroad Co.*, 8 Wis. Ry. Com. 685.

(f) See note 17, B, i, ante Art. II, Sec. a.

(g) The state may provide for local improvements or facilities and adopt reasonable measures in the interest of the health, safety and welfare of the people, notwithstanding such regulations may indirectly affect interstate commerce. A regulation requiring a large increase in street cars operated on an interstate line with one terminus in the center of a large city in another state, cannot be made. One requiring a temperature of not less than 50 degree in cars, is unreasonable. One requiring platforms to be clear and cars to be fumigated weekly is reasonable and within the power of the state. *S. Covington & C. S. R. Co. v. Covington*, 235 U. S. 537, 59 L. Ed. —; *Minnesota Rate Cases* (*Simpson v. Shepard*), 230 U. S. 352, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. 729.

(h) Interstate trains may be required to render adequate local service. *State v. Pub. Ser. Com.* (Wash.), 142 Pac. 684; *Gulf, C. & S. F. R. Co. v. State* (Tex.), 169 S. W. 385.

(i) See note 43, ante, Art. II, Sec. m.

ties, rules, regulations, or practices thereafter to be put in force, observed, rendered, used, or furnished in the performance of its public duties by said public service company or companies;<sup>33</sup> and thereupon it shall be the duty of every public service company affected by said order to observe and obey said order, and all and every the mandates and requirements thereof.<sup>34</sup>

Section 3.<sup>35</sup> Whenever the Commission shall determine, after hearing, had upon its own motion, or upon complaint, that the

33. (a) *Borough of Mt. Union v. Mt. Union Water Co.*, 2 P. C. R. 698.

(b) Where the power to furnish public service was expressly granted in a charter and exercised for a long time, the company will be required to continue the service. The Commission will not look beyond the charter, but will leave any question as to the legality of the charter provisions, to be settled by the courts. *Grubb v. Bangor Elec. L., H. & P. Co.*, 2 P. C. R. 175.

(c) Although companies were under a common law duty to render adequate service, and said duty was enforceable by the courts, yet where the legislature has provided a tribunal to regulate such companies and enforce such duties, the statute supersedes the common law, and the courts no longer have jurisdiction. *Crosbyton-Southplains R. Co. v. R. R. Com. (Tex.)*, 169 S. W. 1038.

34. (a) Prior to the passage of the Public Service Company Law the only ways for a community to insist upon satisfactory service were by developing strong public sentiment, or by encouraging competition. The latter way was expensive and wasteful in the end. This Act has substituted regulation by the Commission, and the remedy now is by complaint to it concerning the unsatisfactory service. *Borough of Exeter's Petition*, 2 P. C. R. 52, and 539; *Borough of Avoca's Petition*, 2 P. C. R. 372. For a full discussion of the effects of competition, see *Idaho Power & Light Co. v. Blomquist (Idaho)*, 141 Pac. 1083.

(b) One of the principal objects of this Act is to compel the companies to furnish adequate service. *Borough of Schuylkill Haven v. Schuylkill Haven G. & W. Co.*, 2 P. C. R. 617.

(c) A subscriber may demand adequate service at reasonable rates, but he has no right to demand that his telephone be connected with a particular exchange. The exchange systems and zones of service established by a company are the result of its experience, and, in the absence of allegation or evidence to the contrary, will be presumed adequate and proper. *Bonner v. Bell Tel. Co. of Pa.*, 1 P. C. R. 209.

35. See Art. III, Sec. 1, (a) and (b) ante, as to right of companies to collect reasonable charges, Art. III, Sec. 8, (a) and (b) ante, as to discrimination, and Art. V. Sec. 20 (a) post, as to valuation of company's property for rate making purposes.

rates, fares, tolls, or charges established, demanded, exacted, charged, or collected by any public service company or companies, for any service rendered or furnished, are unjust or unreasonable [\*1404] \*able or inadequate,<sup>36</sup> or are unjustly discriminatory or unduly or unreasonably preferential; or that the facilities or service furnished or rendered by any public service company or companies are unjustly discriminatory, or unduly or unreasonably preferential,<sup>37</sup> in favor of or against any particular person, corporation, locality, or any particular kind or description of traffic or service,<sup>38</sup>—then the Commission shall determine,<sup>39</sup> and pre-

36. Under a similar provision of Missouri statute it was held that the commission might prescribe a rate higher than the maximum rate fixed by a prior statute. *State v. Pub. Ser. Com. (Mo.)*, 168 S. W. 1156.

37. See note 32, c, *supra*, Art. V, Sec. 2.

38. A switching service is generally understood to be a movement of a car from one point to another within a station or terminal area. *Penna. Rubber Co. v. P. R. R. Co.*, 3 P. C. R. 31. The inter-plant service of an industry and the general transportation service of a carrier are wholly distinct. *Crucible Steel Co. v. P. R. R. Co.*, 3 P. C. R. 599.

39. *Extent of Commission's Authority.* (a) See *Simpson v. Shepard (Minnesota Rate Cases)*, 230 U. S. 352, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. 729; *Texas & P. Ry. Co. v. U. S.*, 205 Fed. 380, affirmed in 234 U. S. 342, 58 L. Ed. 1341.

(b) A state has the right to fix rates for ferriage across a boundary stream to another state, until Congress regulates such rates. *Port Richmond & B. P. F. Co. v. Bd. of Freeholders*, 234 U. S. 317, 58 L. Ed. 1330.

(c) The state cannot compel a carrier to maintain a rate on a particular commodity that is less than reasonable, in order to build up a local enterprise, even though the return from the entire intrastate business is adequate. *Northern P. R. Co. v. N. Dak. (N. Dak. Coal Rate Case)*, 236 U. S. 585, 59 L. Ed. —; reversing 145 N. W. 135.

(d) The fixing of rates is a legislative, not a judicial, function. *State v. Maine Cent. R. R. (N. H.)*, 92 Atl. 837. The courts may determine the question of reasonableness alone. *Wolverton v. Mountain States Tel. & Tel. Co. (Colo.)*, 142 Pac. 165; *Chi., M. & St. P. Ry. Co. v. State Pub. Ut. Com.*, 268 Ill. 49, 108 N. E. 729. The courts must enforce the rates made unless the constitutional limits of the rate making power have been transgressed. *Louisville & N. R. Co. v. Garrett*, 231 U. S. 298, 58 L. Ed. 229, 34 Sup. Ct. 48; *Louisville & N. R. Co. v. Finn*, 235 U. S. 601, 59 L. Ed. —.

(e) "When the legislature declares, by general law, that all rates must be reasonable, that declaration is purely legislative and cannot be delegated; but the authority to determine what is reasonable is purely admin-



istrative, and can be delegated." *Idaho Power & Light Co. v. Blomquist* (Idaho), 141 Pac. 1083, 1093.

(f) The question of the reasonableness of rates must, in the first instance, be submitted to the Commission. *Borough of Bellevue v. Ohio Valley Water Co.*, 245 Pa. 114, 91 Atl. 236, affirming 1 P. C. R. 128; *Geo. C. Gochenauer v. Riverton C. W. Co.*, 1 P. C. R. 137.

(g) Rates fixed by franchise ordinance prior to the enactment of a public service company law may be changed by the commission without impairing the obligation of the contract. Rates so fixed are subject to the exercise of the rate making power of the legislature either by itself or by a commission established by it. *City of Benwood v. Pub. Ser. Com.* (W. Va.), 83 S. E. 295. So also with contracts made between a consumer and a company. *Union Dry Goods Co. v. Public Service Corp.* (Ga.), 83 S. E. 946.

(h) The Commission cannot compel a railroad to operate its passenger business at a loss and to recoup by an increase in freight rates. The railroad is entitled to earn a fair profit on every branch of its business, subject to the limitation that its corporate duties must be performed even though at a loss. *Combined Committee, etc., v. P. R. R. et al.*, 2 P. C. R. 390, Supplemental opinion 717, Rehearing denied, 728. Cf. *Elliott v. Big Spring Elec. Co.*, 2 P. C. R. 709. *Northern P. R. Co. v. N. Dak.* (N. Dak. Coal Rates Case), 236 U. S. 585, 59 L. Ed. —.

(i) The Commission clearly has the power to prescribe a reasonable maximum fare; and, having the power to classify rates, it can presumably prescribe different maximum fares for different classes or kinds of passenger service; but the power to prescribe for any particular ticket a schedule of charges worked out on a "per station" system, is not specifically granted by the statute. The Commission cannot prescribe a schedule of absolute fares to be charged at successive stations. If it goes further than to fix a single maximum rate per mile, within which the charges for a particular ticket shall be sold, it must establish a series of maxima varying either per station or by some scheme of fare zones. *Combined Committee, etc., v. P. R. R. Co. et al.*, 2 P. C. R. 717.

(j) Whether the service involved in receiving and delivering freight on industrial spur tracks within a carrier's switching limits in a city is one for which a carrier may charge a rate in addition to the line haul, is a question peculiarly for the commission. *I. C. C. v. Atchison, T. & S. F. R. Co.*, 234 U. S. 294, 58 L. Ed. 1319.

(k) The power given to the Public Service Commission of New Hampshire to fix rates, does not prevent the legislature from subsequently prescribing a rate. *State v. Maine Cent. R. R.* (N. H.), 92 Atl. 837.

(l) A franchise of a street railway company providing that rates charged shall not exceed 5 cents, does not constitute a contract suspending the governmental power of regulation during the life of the franchise. *Portland Ry. Light & Power Co. v. City of Portland*, 210 Fed. 667; Same

scribe by a specific order, the maximum, just, due, equal, and reasonable rates, fares, tolls, and charges to be thereafter established, demanded, exacted, charged, or collected for the service to be performed;<sup>40</sup> and the just, due, equal, reasonable, and proper regulations and practices, as affecting such rates, to be observed by the

v. Same, 201 Fed. 119; Milwaukee Elec. Ry. & L. Co. v. R. R. Com., 142 N. W. 491, 153 Wis. 592, Ann. Cas. 1915 A, 911, affirmed in U. S. Adv. Ops. 1914, 820, 59 L. Ed. —.

#### 40. REASONABLENESS OF RATES.

**A. Evidence—Burden of Proof.** (a) The evidence produced in support of a complaint alleging unreasonable rates should be sufficient to make a *prima facie* case. *Spring Brook Lumber Co. v. Bell Tel. Co.*, 1 P. C. R. 225.

(b) The evidence inducing the Commission to prescribe a new rate should be clear and certain. *Cox & Co. v. L. S. & M. S. Ry.*, 1 P. S. C. Rep. 169.

(c) Where rates on anthracite coal have remained the same for over seventeen years, the presumption is against the propriety of continuing these rates. This presumption does not go to the extent of indicating that they ought to be raised or lowered, but only that they ought to be revised and changed so as to meet present conditions. *Phila. v. P. & R. Ry. Co. et al.*, 2 P. C. R. 313. Cf. *Louisville & N. R. Co. v. U. S.*, U. S. Adv. Ops. 1914, 696, 59 L. Ed. —.

(d) Where low rates originally established to build up an industry were continued long after said purpose was accomplished and then raised only on the ground that they were discriminatory, there is an inference that the prior rates were reasonable and compensatory. *Louisville & N. R. Co. v. Finn*, 235 U. S. 601, 59 L. Ed. —, affirming *L. & N. R. Co. v. Ky. R. R. Com.*, 214 Fed. 465.

(e) Where an existing freight rate is attacked, the burden is on the complainant to establish that it is unreasonable in fact. *Louisville & N. R. Co. v. U. S.*, U. S. Adv. Ops. 1914, 696, 59 L. Ed. —.

(f) Where the dispute concerning the reasonableness of a flat rate per year for water arose because of a difference in estimates of the amount consumed, the company was ordered to install a meter and charge at its rate filed. *Mansfield State Normal School v. Mansfield Water Co.*, 2 P. C. R. 522.

**B. Rates fixed by Statute or Prior Contract.** (a) Where a contract between a municipality and a water company fixing rates is for an indeterminate time, the company is not bound to maintain the schedule of rates therein. *Boro. of Mt. Union v. Mt. Union Water Co.*, 2 P. C. R. 698; *Boro. of Bellevue v. Ohio Valley Water Co.*, 1 P. C. R. 128, affirmed 245 Pa. 114; *Turtle Creek Boro. v. Penna. Water Co.*, 243 Pa. 415; *Wolverton v. Mountain States Tel. & Tel. Co. (Colo.)*, 142 Pac. 165. See note 73, A, IV, under Art. III, 1, a, ante.

(b) Rates previously agreed upon between utilities and patrons will continue in force until the commission has found them unreasonable and has prescribed other rates. *Kaul v. Am. Ind. Tel. Co.* (Kan.), 147 Pac. 1130. But where a subsequent statute has prescribed a rate, prior contracts for a lower rate are unenforceable. *Seaman v. Minneapolis & R. R. Ry. Co.* (Minn.), 149 N. W. 134.

**C. Effect of Competition.** Competition that is real and substantial and which exercises a potential influence on rates, may create such dissimilarity of conditions that a lower rate at the competitive point will not amount to discrimination. Whether competition actually does produce such dissimilarity must be determined from the facts of each case as it arises. *Goerlich v. Bethlehem City Water Co.*, 1 P. C. R. 213. *Lewistown v. Penn Central L. & P. Co.*, 2 P. C. R. 249. In rate making cases the weight to be given to evidence relating to rates which the carrier insists had been enforced by competition, is peculiarly a matter for the commission. *Louisville & N. R. v. U. S.*, 216 Fed. 672, affirmed in U. S. Adv. Ops. 1914, 696, 59 L. Ed. —.

**D. Comparison of Rates.** (a) "There are so many matters which must be taken into consideration in fixing the rates for service in any locality that it is almost impossible to find similar conditions existing in other localities which would make the rate in one locality evidence of what it should be in another." *Boro. of Mechanicsburg v. Mechanicsburg G. & W. Co.*, 246 Pa. 232, 92 Atl. 142.

(b) The weight given to comparisons of commutation fares in suburban districts of two different cities depends upon the similarity of conditions as regards expense of service, volume and concentration of traffic, and other factors affecting the reasonableness of charges. *Combined Committee, etc., v. P. R. R. Co.*, 2 P. C. R. 717.

(c) The fact that water rates in a large community are lower does not prove that the higher rates in a small community are unreasonable. *Ernst v. Glenside Water Co.*, 2 P. C. R. 119.

(d) Evidence offered for the purpose of making a comparison of rates is irrelevant where it is not shown that the conditions of service are similar. *Thompson & Hanna Co. v. Erie County Elec. Co.*, 2 P. C. R. 199; *Combined Committee, etc., v. P. R. R. Co.*, 2 P. C. R. 717; *Curry v. Emlenton Water Co.*, 2 P. C. R. 613.

(e) Where the evidence does not show with exactness all the elements entering into the cost of transportation, nor the value of the investment, a comparison of rates will be made in order to arrive at the reasonableness of freight rates. *Phila. v. P. & R. Ry. Co.*, 2 P. C. R. 313; *Louisville & N. R. Co. v. U. S.*, U. S. Adv. Ops. 1914, 696, 59 L. Ed. —.

**E. Local Conditions Affecting Rates.** Local conditions must always be considered in making a schedule of rates on lines of a transportation plant. The size of cars, the frequency of service, the density of population of adjacent territory, the grades and general alignment of the road bed,

public service company;<sup>41</sup> and the Commission may classify<sup>42</sup> such rates. The said order shall be served, as hereinafter provided, upon all public service companies by which such rates, fares, tolls, and charges, and such regulations and practices affecting the same, are thereafter to be charged and observed.<sup>43</sup> The power to fix maximum rates or charges shall include the power to fix joint rates or charges where joint service is rendered by two or more public service companies, or where other public service companies may be interested in the rate or charge.<sup>44</sup>

Section 4. Whenever the Commission receives notice of any change proposed in any tariff or schedule filed or posted under the provisions of this act, it shall have power, either upon complaint or upon its own motion, and, if it so orders, without answer or other formal pleading by the interested public service company, after notice, to hold a public hearing, and make investigations as to the propriety of such proposed change and of the new rate, practice, or classification. After such hearing and investiga-

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the annual outlay for repairs and up keep on the different lines, all figure in the problem of rate making. *Sassaman v. Lehigh Valley Transit Co.*, 2 P. C. R. 80.

**F. Valuation.** In determining whether particular rates are reasonable, and especially whether particular rates are unjustly discriminatory or unduly preferential, it is discretionary with the Commission whether a valuation of any or all of the property of a public service company shall be made. *Penna. Rubber Co. v. P. R. R. Co.*, 2 P. C. R. 31.

**G.** See also note 73, ante, Art. III, Sec. 1, a, ante.

41. The power to fix rates must include the power to say who shall provide and pay for the meter to be used to determine the amount the consumer shall pay. *Title Guaranty & Trust Co. v. R. R. Com. (Cal.)*, 142 Pac. 878.

42. In re classification of pulp wood. *W. Va. Pulp & Paper Co. v. P. R. R. Co.*, 2 P. C. R. 673.

43. (a) See Rules of Practice and Procedure, Rule 39, 2 P. C. R. 30.

(b) The order will become effective at the time specified therein, and is not controlled by the provisions of the act requiring 30 days notice (Art. II, (f)) to the public. *State v. Pub. Ser. Com. (Wash.)*, 141 Pac. 351.

44. The rate on cement in Pennsylvania from the Nazareth district to Easton, which is 10 cents per ton higher than the rate from the Lehigh district to Easton, is reasonable, as the former involves a joint service while the latter is a one line haul. A higher additional rate per ton for a joint service would be unreasonable. *Dexter Portland Cement Co. v. L. V. R. R. Co. et al.*, 2 P. C. R. 447.

tion, whether completed before or after such change goes into effect, the Commission may make such order in reference to the new rate, practice, and classification as would be proper in a proceeding initiated after the same had become effective. At any such hearing involving any proposed increase in any rate, the burden of proof to show that such increased rate is just and reasonable shall be upon the public service company.<sup>45</sup>

The Commission shall have power, in its discretion, and for good cause shown, to permit changes in the tariffs or schedules filed and published, upon less than the thirty days' notice specified in article two, section one (f), of this act, or upon other conditions which shall be just and reasonable.<sup>46</sup>

The Commission shall also have power, in its discretion, where

45. (a) The mere raising of rates is not in and of itself determinative of the unreasonableness or excess of such increase, and an explanation of it is always admissible. *Borough of Mechanicsburg v. Mechanicsburg G. & W. Co.*, 246 Pa. 232, 92 Atl. 142.

(b) The question of whether in any particular case sufficient proof has been adduced is left, in a large measure, to the judgment of the Commission. *W. Va. Pulp & Paper Co. v. P. R. R. Co.*, 2 P. C. R. 673.

(c) Where it is shown that a rate was increased to avoid violation of the long and short haul clause, this burden is met unless allegation is made that the new rate is excessive. *Helb v. W. M. Ry. Co.*, 1 P. S. C. Rep. 145.

(d) A railroad company cannot arbitrarily increase its rate at a certain point in order to divert traffic from that point. *Jones v. D., L. & W. R. R. Co.*, 2 P. C. R. 461.

(e) The cancellation of a reasonable joint rate is not warranted by the fact that the participants in such rate can not agree as to the division of it. It should be continued pending the apportionment by the Commission. *Pittsburgh Steel Co. v. P. & L. E. R. R. et al.*, 2 P. C. R. 86.

(f) Where the rates of an electric company yield a fair return on all its business, an increase in its power rates will not be allowed where this item is not separated from the rest of the business and the return upon it clearly shown to be unremunerative. *Elliott v. Big Spring. Elec. Co.*, 2 P. C. R. 709.

(g) The burden is upon the complainant when an existing rate is attacked. *Louisville & N. R. Co. v. U. S.*, Adv. Ops. 1914, 696, 59 L. Ed. —.

46. See General Order No. 4, regulating notice of change in tariffs or schedules in the matter of fares for excursions limited to certain designated periods. 1 P. C. R. 67. In the matter of requiring published rates and fares to continue in effect for 30 days, see *Administrative Ruling No. 5*, 2 P. C. R. 287, superseding *Conference Ruling No. 1*, 2 P. C. R. 100.

any notice of increase in any rates, fares, tolls, or charges of a public service company has been filed, to require by general rule [\*1405] or special \*order that such company shall furnish to its shippers, consumers, or other patrons a certificate or other evidence of payments made by them in excess of the prior established rate.

Section 5. If, after hearing, upon complaint or upon its own motion, the Commission shall determine that any rates which have been collected,<sup>47</sup> or any acts which have been done or omitted to be done, or any regulations, classifications, or practices which have been enforced for, or in relation to, any service rendered after this act becomes effective, by any public service company complained of, were in violation of any order of the Commission, or were unjust and unreasonable or unjustly discriminatory, or unduly or unreasonably preferential; or, in like manner, shall find that the rates so collected are in excess of the rates contained in the tariffs or schedules of any such public service company on file or posted, and in effect and applicable at any time the said service was rendered,<sup>48</sup>—the Commission shall, upon petition,<sup>49</sup> have the power and authority to make an order for reparation,<sup>50</sup> award-

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47. The payment of an excessive rate, even though it be made without protest, is not such a voluntary payment as cannot be recovered from the company. *Pioneer Tel. & Tel. Co. v. State*, 138 Pac. 1033, 1037. Or as will bar an action for damages for discrimination. *Mitchell C. & C. Co. v. P. R. R. Co.*, 241 Pa. 536, affirmed in U. S. Adv. Ops. 1914, 787, 59 L. Ed. —.

48. (a) The Commission will not order reparation where charges were made on meter readings, but were large because of a leak in the line, known to complainant. *White v. Phillips Gas & Oil Co.*, 1 P. S. C. Rep. 186.

(b) The Commission has no jurisdiction to order payment of damages for loss or delay of property in transit. *Chas. Dreifus Co. v. P. & R. Ry.*, 1 P. S. C. Rep. 189; *Pettis v. P. & R. Ry.*, 1 P. S. C. Rep. 191; *Mutual Film Corp. v. Ad. Ex. Co.*, 1 P. S. C. Rep. 216. Nor for damages to property by fire caused by sparks from locomotive. *Barr v. P. R. R. Co.*, 1 P. S. C. Rep. 246.

49. See Rules of Practice and Procedure, Rule 34. 2 P. C. R. 25.

50. (a) The Commission has full power to refund any moneys collected under a rate which by final order of the Commission shall be determined to be excessive, so that a court will not restrain a water company from increasing its rates pending a decision thereon by the Commission. *Boro. of Bellevue v. Ohio Valley Water Co.*, 1 P. C. R. 128,

ing and directing the payment to any such complainant, petitioner, within a reasonable time specified in the order, of the amount of damages sustained in consequence of said unjust, unreasonable, or unlawful collections, acts or commissions, regulations, classifications or practices, of such public service company: Provided, That such damages have been actually sustained by such complainant petitioner.<sup>61</sup>

affirmed in 245 Pa. 114, 91 Atl. 236; *Gochenauer v. Riverton C. W. Co.*, 1 P. C. R. 137.

(b) In disposing of the business of the Railroad Commission, the Public Service Commission is authorized to use not the powers formerly exercised by the Railroad Commission, but the powers conferred upon it by the Act of July 26, 1913, one of which is to make orders of reparation. *Penna. Paraffine Works v. P. R. R. Co.*, 2 P. C. R. 513.

(c) Claims for reparation on shipments that moved prior to Jan. 1, 1914, will not be considered. 2 P. C. R. 104.

51. (a) Reparation is a return of the difference between the unjust rate paid and a rate which is reasonable, and cannot be awarded until it is shown what the reasonable rate is. *Adrian Furnace Co. v. P. R. R. Co.*, 2 P. C. R. 632.

(b) In case of rebating the amount of the rebate may be taken as the measure of damages, and in case of an unreasonable rate, the difference between it and what was a reasonable rate, may be taken, provided the evidence in each case shows it to be the actual damage. *Meeker v. L. V. R. Co.*, 236 U. S. 412, 59 L. Ed. —.

(c) The fact that a shipper paid a discriminatory rate is not necessarily evidence that he suffered damage to the amount of the difference between what he and others paid. He should show affirmatively the extent to which he was damaged. *L. V. R. Co. v. American Hay Co.*, 219 Fed. 539.

(d) A finding by the Commission that certain freight rates were excessive is presumptive evidence that shippers who paid the rate were damaged to the extent of the difference between the excessive rate and a reasonable rate. *Darnell-Taenzer Lumber Co. v. So. Pac. Co.*, 221 Fed. 890.

(e) As to damages where complainants and the favored shipper were competitors, see *Seaman v. Minneapolis & R. R. Ry. Co. (Minn.)*, 149 N. W. 134.

(f) Where in-bound shipments were made at local rates under a milling in transit agreement whereby a portion of the local rates collected was to be refunded upon the shipment of the goods from the mill, and while the goods were at the mill the rates on out-bound shipments were considerably reduced by the Corporation Commission and the former tariffs cancelled by the carrier, held: the shipper, upon shipping his goods from

The Commission shall state in said order the exact amount to be paid, as well as its findings upon pertinent questions of fact.<sup>52</sup>

If the public service company does not comply with the aforesaid order for the payment of money within the time fixed therein, the person named therein, to whom such payment is directed to be made, may sue therefor in any Court of Common Pleas of this Commonwealth; and said order made by the Commission shall be prima facie evidence of the facts therein stated,<sup>53</sup> and that the amount awarded is justly due the plaintiff in such suit, and the defendant public service company shall not be permitted to avail itself of the defense that the service was, in fact, rendered to the plaintiff at the rate contained in its tariff or schedules in force at the time payment was made and received.

No reparation, as herein provided, shall be awarded by the Commission unless the complaint or petition shall have been filed with it within two years from the time when the cause of action accrued.<sup>54</sup> A suit for the enforcement of an order directing such [\*1406] payment shall be filed in the said court of common pleas within one year from the date of the order, and not after.

No action shall be brought in any court on account of the wrongs or injuries referred to in this section, unless and until the Commission shall have determined that the rate, regulation, classi-

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the mill at reduced rates, is not entitled to the refund of a portion of the in-bound rate paid. *St. L. & S. F. R. Co. v. Walton-Chandler Lumber Co.* (Okla.), 145 Pac. 340.

(g) A railroad company is liable for damages to an express company which has offered to obey its rules and regulations, and pay its rates, and to whom it has refused service. *Missouri, K. & T. R. Co. v. Empire Ex. Co.* (Tex.), 173 S. W. 222.

52. These findings should be the ultimate rather than the evidential facts. *Meeker v. L. V. R. R. Co.*, 236 U. S. 412, 59 L. Ed. —; *Mills v. L. V. R. R. Co.*, U. S. Adv. Ops. 1914, 888, 59 L. Ed. —.

53. (a) This is merely a rule of evidence. It does not abridge the right of trial by jury, or take away any of its incidents. Nor does it in any wise work a denial of due process of law. *Meeker v. L. V. R. R. Co.*, supra.

(b) As to what findings of fact by the Commission will be prima facie evidence of the facts stated therein, so as to avoid conflict with the 7th Amendment of the U. S. Constitution, protecting the right of a trial by jury, see *L. V. R. R. Co. v. Meeker*, 211 Fed. 785, 807-811, *Meeker v. L. V. R. R. Co.*, supra.

54. *A. J. Phillips Co. v. Grand Trunk W. R. Co.*, 236 U. S. 662, 59 L. Ed. —.



fication, practice, act, or omission in question was unjust, unreasonable, or unjustly discriminatory or unduly or unreasonably preferential,<sup>55</sup> or in excess of the rates contained in the said tariffs or schedules, and, then, only to recover such damages as may have been awarded and directed to be paid by the Commission in said order.<sup>56</sup>

Section 6. In the case of any street railway corporation or incline plane corporation, the Commission may also, whenever it may deem it necessary or proper, for the accommodation, convenience or safety of the public, in the conveyance of passengers, after hearing had upon its own motion or upon complaint, require such street railway corporations or incline plane corporations to transfer such passengers to or from another part of the system of the said street railway corporation or incline plane corporation;<sup>57</sup> and, to this end and object to make proper and convenient arrangement or adjustment of the time schedules of said street railway corporation or incline plane corporation; and also to make such proper and convenient adjustment of its time schedules with those of other contiguous or connecting street railway corporations or incline plane corporations, as to the Commission shall deem necessary or proper, for the accommodation, convenience, and safety of the public.

Section 7. The commission shall have power to require railroad corporations and street railway corporations to construct and maintain such switch or other connections,<sup>58</sup> with or between the

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55. (a) The question of the reasonableness of rates must, in the first instance, be submitted to the Commission. *Boro. of Bellevue v. Ohio Valley Water Co.*, 245 Pa. 114, 91 Atl. 236.

(b) The proper remedy is a petition to the Commission, not to the courts. *State v. Metaline Falls L. & W. Co.* (Wash.), 141 Pac. 1142.

(c) *Texas & P. R. Co. v. Am. Tie & T. Co.*, 234 U. S. 138, 58 L. Ed. 1255.

56. (a) *American Reduction Co. v. B. & O. R. R. Co.*, 2 P. C. R. 672.

(b) The right to recover damages for alleged discrimination in rates will not be defeated by payment to the carrier of the balance of the lawful rate by the party in favor of whom the discrimination was made. *Seaman v. Minneapolis & R. R. Ry. Co.* (Minn.), 149 N. W. 134.

57. *27th Ward Prog. Club v. Pittsburgh Ry. Co.*, 2 P. C. R. 585.

58. *Farmers' Elevator Co., &c., v. Chi., R. I. & P. Ry. Co.*, 266 Ill. 567, 107 N. E. 841.

lines of other companies of the same character, as are reasonably practicable, and as the Commission shall deem necessary and proper, for the service, accommodation, and convenience of the public; and shall also have power to establish through routes and joint rates and classifications, for the conveyance of persons and property between any two or more points within this Commonwealth, whenever the railroad corporations concerned shall have refused or neglected voluntarily to establish such through routes and joint rates and classifications, and to prescribe the just terms and conditions under which said through routes shall be operated.<sup>59</sup> Provided, That, in establishing such through route, the Commission shall not require any railroad company, without its consent, to embrace in such route substantially less than the entire [\*1407] length of \*its railroad and of any intermediate railroad, operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with another practicable through route which would otherwise be established.<sup>60</sup>

The Commission shall, in case of failure of the railroad corporations or street railway corporations concerned to agree among themselves upon the division of the cost of construction, maintenance, and operation of the connections thus provided for, or the allowance to be made for the interchange of service, or the apportionment of any joint rates,<sup>61</sup> ascertain, and by order prescribe

59. (a) *Adrian Furnace Co. v. P. R. R. Co.*, 2 P. C. R. 632. As to the nature of the action in which such order may be made, cf. *St. L., I. M. & S. Ry. Co. v. U. S.*, 217 Fed. 80.

(b) *Lehigh Fire Brick Works v. P. R. R. Co.*, 2 P. C. R. 625.

(c) A state commission cannot prescribe the terms upon which switching movements which are a part of interstate commerce, shall be made. *Ill. C. R. Co. v. De Fuentes*, 236 U. S. 157, 59 L. Ed. —.

(d) Congress has not taken over the whole subject of terminals, team tracks, switching tracks, sidings, etc., so as to exclude regulation of interchange traffic by state commissions. *Grand Trunk R. Co. v. Mich. R. R. Co.*, 231 U. S. 457, 58 L. Ed. 310; *Vandalia R. Co. v. Pub. Ser. Com. (Ind.)*, 106 N. E. 371.

60. *St. L., I. M. & S. Ry. Co. v. United States*, 217 Fed. 80.

61. See Art. V, Sec. 10, post.

and fix, the equitable and just apportionment and division of the same.<sup>62</sup>

Nothing in this section shall give the Commission power over street railway corporations engaged in the business of carrying passengers, but not engage in the general business of transporting freight, and which do not generally solicit the transportation of freight as a main branch of their business.

Section 8. In the case of a telegraph corporation, or person engaged in the public telegraph business, the Commission may also, whenever it may determine it to be necessary or proper for the accommodation or convenience of the public so to do, after hearing had upon its own motion or upon complaint, require any such telegraph corporation or person to permit any other such telegraph corporation, or person engaged in the public telegraph business, to connect its or his lines of telegraph with the lines of telegraph of such first-named telegraph corporation or person; and interchangeably to receive dispatches from and for each other, and from and for any individual or individuals; and, on payment of its or his usual charges to individuals for transmitting dispatches, as established by the rates and regulations of such telegraph corporation or person, or by the Commission as hereinafter provided, to transmit such dispatches with impartiality and good faith.<sup>63</sup>

Section 9. Whenever the Commission shall find that there are any two or more telephone companies whose lines form a continuous line of communication, or could be made to do so by the construction and maintenance of suitable connections between the several lines at common points, for the transmission of conversations between different localities which are not reached by the lines of either company alone,<sup>64</sup> and that such connections and facilities for the through transmission of conversations, jointly, [\*1408] over the several lines, \*can reasonably be made, and an efficient service can be obtained without injustice to either com-

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62. Where a joint rate, concededly reasonable, was cancelled pending a decision of the Commission as to the equitable apportionment of said rate, the cancellation was held unwarranted, and the rate restored. *Pittsburgh Steel Co. v. P. & L. E. R. R. Co.*, 2 P. C. R. 86.

63. See Art. II, Sec. u, ante.

64. *Pac. Tel. & Tel. Co. v. Eshleman*, 137 Pac. 1119, 1126-1138; *Pac. Tel. & Tel. Co. v. Wright and Dickson Hotel Co.*, 214 Fed. 666.

pany, and without substantial impairment or detriment to the service to be rendered by either company, and that a public necessity exists therefor; or shall find that any two or more telephone companies have failed to establish just and reasonable joint rates or charges for through service, by or over their several lines so connected, and that such joint rates or charges ought to be established, in order to supply a through traffic and communication between different localities not otherwise provided for, or proffered by the companies in question, or either of them,—the Commission may by its order require that such connection be made and facilities supplied, and that through conversations be transmitted thereby; and may prescribe the through line and joint rates and charges to be made and to be used and in force in the future; and shall appoint or approve necessary and proper conditions, rules, and regulations for the joint through traffic, and an equitable apportionment between the several companies of the costs and revenues in connection therewith, and the Commission may fix the same by its order, to be duly served upon the company or companies affected.<sup>65</sup>

Section 10. Where the public service companies entitled to share in any joint rate or charge shall be unable to agree upon the division thereof, or shall make any unjust, unreasonable, or unduly discriminatory or preferential division or apportionment thereof, the Commission may, after hearing, upon its own motion or upon complaint, fix the proportion to which every such public service company shall be entitled.<sup>66</sup>

Section 11. The Commission may investigate the rates or interstate traffic facilities or service of common carriers within this Commonwealth, and when such rates, facilities, or service are, in the determination of the Commission, unjust, unreasonable, or un-

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65. See Art. II, Sec. v, ante. *State v. Skagit R. Tel. & Tel. Co.* (Wash.), 147 Pac. 885.

66. (a) The cancellation of a reasonable joint rate is not warranted by the fact that the participants in such rate cannot agree as to the division thereof. It should be continued pending the apportionment by the Commission. *Pittsburgh Steel Co. v. P. & L. E. R. R. Co.*, 2 P. C. R. 86.

(b) A carrier is not entitled to a portion of a joint rate on its own line for carrying its own property. Such a division would be discriminatory. *Rio Grande & E. P. Ry. Co. v. R. R. Com.* (Tex.), 175 S. W. 1116; *Same v. Tex. Mex. Ry. Co.* (Tex.), 173 S. W. 236.

justly discriminatory, or unduly or unreasonably preferential, or in violation of the interstate commerce law, or in conflict with the rulings, orders, or regulations of the Interstate Commerce Commission, the Commission may apply by petition to the said Interstate Commerce Commission for relief, or may present to the said Interstate Commerce Commission all facts coming to its knowledge as to the violation of the rules, orders, or regulations of that Commission, or as to the violation of the interstate commerce law.

Section 12. Except in cases in which grade crossings are in process of abolition at the time of the passage of this act, under agreement or contract with a municipality, as set forth in the [\*1409] proviso of section \*five of article three of this act, the Commission shall have exclusive power<sup>67</sup> to determine, order and prescribe, in accordance with plans and specifications to be approved by it, the just and reasonable manner,<sup>67</sup> including the particular point of crossing, in which the tracks or other facilities of any public service company may be constructed across the tracks or other facilities of any other public service company at grade, or above or below grade, or at the same or different levels;<sup>68</sup> or in which the tracks or other facilities of any railroad corporation or street railway corporation may be constructed across the tracks or other facilities of any other railroad corporation or street railway corporation, or across any public highway, at grade, or above or below grade;<sup>69</sup> or in which any public highway may be constructed across the tracks or other facilities of any railroad corporation or street railway corporation at grade, or above or below grade; and to determine, order and prescribe the terms and con-

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67. The mode and manner of the regulation of railroad or highway crossings are matters of legislative discretion, and may be exercised through a board or commission. *Alton & S. R. R. v. Vandalia R. Co.*, 268 Ill. 68, 108 N. E. 800.

68. Where a crossing which is not in accordance with the terms of the Commission's approval is about to be made, complaint should be made to the Commission under Art. VI, Sec. 6, post. A Court of Common Pleas will not issue an injunction. *Citizens' Elec. Ill. Co. v. Consumers' Elec. Co.*, 2 P. C. R. 426, 17 Luz. L. R. 413.

69. The Commission has jurisdiction where a portion of a highway is vacated. *In re Grade Crossings, etc.*, 2 P. C. R. 586.

ditions of installation and operation, maintenance and protection, of all such crossings which may now or hereafter be constructed, including the stationing of watchmen thereat, or the installation and regulation of lights, block or other system of signaling, safety appliances, devices, or such other means or instrumentalities as may to the Commission appear reasonable and necessary,<sup>70</sup>—to the end, intent, and purpose that accidents may be prevented and the safety of the public promoted.<sup>71</sup> No such crossing shall be constructed without the approval of the Commission,<sup>72</sup> evidenced by its "Certificate of Public Convenience," as provided in section five of article three of this act; but in no case shall the approval or consent of any court, board, or other commission or officer, or of any municipality, be necessary therefor. It shall be proper, however, for the Commission, by general rule or order, whenever the same can be properly regulated by suitable general rule, to prescribe the terms and conditions under which such crossing may be constructed, operated, maintained, or protected, without the particular approval of the Commission.

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70. (a) In the matter of regulations governing the protection of grade crossings, see **General Order No. 5**, 1 P. C. R. 67.

(b) The Commission will modify plans and specify appliances, when necessary for the safety of the public. **Application of Gaffney & James Cy. R. R. Co.**, 2 P. C. R. 112.

71. (a) Where the proposed extension of a street railway line crossed the tracks of a protestant company on the crest of an elevation toward and from which the cars of the protestant company must ascend and descend, the Commission approved the crossing but ordered that the cars operating on the extension should be brought to a full stop before crossing the tracks of the protestant. **Petition of Phoenixville, &c., Ry. Co.**, 2 P. C. R. 191.

(b) A grade crossing over a much traveled city street will not be approved except upon certain and convincing evidence of a public necessity for it. **Petition of Cornwall & Lebanon R. R. Co.**, 2 P. C. R. 388.

(c) Persons petitioning for a grade crossing have a heavy burden of proof resting upon them. **Appeal of C. V. R. R. Co.**, 245 Pa. 107, 91 Atl. 254.

72. (a) See Rules of Practice and Procedure, Rule 33. 2 P. C. R. 23.

(b) Where a contract is made between a township and a railroad company providing for the abolition of a crossing, the approval of the contract and the approval of the crossing should be sought in separate proceedings. **Application of Supervisors of Concord Twp.**, 2 P. C. R. 590.

The Commission shall also have exclusive power, upon its own motion<sup>73</sup> or upon complaint, and after hearing as hereinafter provided (of which all the parties in interest, including the owners of adjacent property, shall have due notice), to order any crossing aforesaid, now existing or hereafter constructed at grade, or at the same or different levels, to be relocated or altered, or to be abolished, according to plans and specifications to be approved, and upon just and reasonable terms and conditions to be prescribed, by the Commission.<sup>74</sup>

[\*1410] \*The compensation for damages which the owners of adjacent property, taken, injured, or destroyed, may sustain in the construction, relocation, alteration, or abolition of any such crossing specified in this section (for which compensation the said owners are hereby invested with warrant of authority, upon appeal from the determination of the Commission, to sue the Commonwealth), shall, after due notice and hearing, be ascertained and determined by the Commission;<sup>75</sup> and such compensation, as well as the expense of the said construction, relocation, alteration, or abolition of any such crossing, shall be borne and paid, as hereinafter provided, by the public service company or companies or municipal corporations concerned, or by the Commonwealth, either severally or in such proper proportions as the Commission may, after due notice and hearing, in due course, determine, unless the said proportions are mutually agreed upon and paid by those interested as aforesaid.<sup>76</sup>

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73. *In re Grade Crossings, etc.*, 2 P. C. R. 593.

74. Record of Grade Crossings abolished between Jan. 1, 1914, and June 30, 1914. 1 P. S. C. Rep., Appendix "G," 373-376.

75. *In re Abolition of Grade Crossing, etc.*, 2 P. C. R. 730.

76. (a) *Borough of Butler's Petition*, 2 P. C. R. 65; *Application of Wilkes-Barre Connecting R. R.*, 2 P. C. R. 470; *In re Grade Crossings, etc.*, 2 P. C. R. 593.

(b) The fact that a viaduct over the tracks of several railroad companies is built chiefly for the benefit of a city does not exempt the companies from their share of the responsibility in making the improvement. *Wilkes-Barre v. L. V. R. R. Co. et al.*, 2 P. C. R. 278.

(c) The Commission has no power to determine damages for appropriation of land by a railroad company for railroad purposes. *In re Grade Crossings, etc.*, 2 P. C. R. 586.

(d) A railroad company may be required by the state to construct

In prescribing the terms and conditions, upon which any such crossing may be constructed or relocated, or altered or abolished, and the proportionate contributions to the expense thereof, including the damages or compensation to the owners of adjacent property, as aforesaid, the Commission may, among other things, take into consideration the relative importance to the public of the services rendered by the public service companies concerned, as well as the priority of location: Provided, That where any portion of the cost and expense thereof shall have been or shall be borne in the future by the Commonwealth or any municipal corporation, such portion shall not be taken into account by the Commission in fixing any valuation, for any purpose, under any of the provisions of this act: And provided further, That where the order of the Commission shall, as part of the regulation of the construction, relocation, alteration, or abolition of any crossing aforesaid, require, as incidental thereto, a relocation, changes in or the removal of any adjacent structures, equipment or other facilities of any telegraph, telephone, gas, electric light, water-power, water pipe-line, or other public service company, said company shall, at its own expense, relocate, change, or remove such structures, equipment, or other facilities, in conformity with the order of the Commission; and in default of compliance with such order, the Commission shall cause the work and materials to be done and furnished in accordance with the said order, and may recover the cost and expense thereof from the said public service company.

Before the Commission shall make any final order relative to

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overhead crossings at its own expense, and the cost to the company, as a matter of law, is *damnum absque injuria*, or deemed to be compensated by the public benefit which the company is supposed to share. *Missouri P. R. Co. v. Omaha*, 235 U. S. 121, 59 L. Ed. —.

(e) A railroad company may be required to bear the whole expense of a viaduct to carry a city street and the tracks of a street railway over its tracks, although the cost of constructing said viaduct so as to carry the street railway will be \$50,000 greater than a viaduct to carry other traffic only. Such a requirement does not deprive the company of property without due process of law. *Missouri P. R. Co. v. Omaha*, 235 U. S. 121, 59 L. Ed. —.

(f) Similar provision in Public Service Commission Law of Missouri held not retrospective. *State v. Missouri P. Ry. Co. (Mo.)*, 174 S. W. 73.



[\*1411] the construction, relocation, alteration, or \*abolition of any crossing involving any public highway or street, an effort shall be made by the Commission to reach an agreement with the proper officials of the municipal corporations concerned, determining the plans and specifications governing such crossings; and, in default of such agreement, the Commission shall exercise the exclusive power vested in it under this section, and shall finally determine and adopt the complete plans and specifications, and locate all lines and grades in said public highways and streets, and may permit the public service company or companies, or the municipal corporation, to do the whole or any portion of the work in accordance therewith; otherwise, the Commission shall do the work by contract or contracts, to be awarded, after due advertisements, to the lowest responsible bidder in accordance with the said plans and specifications.

The said contractor shall be authorized, in the name of the Commission, to collect by due process of law from the public service company or companies, or the said municipal corporations, or from the Commonwealth, either severally or proportionately as may be determined by the Commission, the amount which may be justly due him under the terms of his said contract with the Commission; and any amount so determined to be paid the said contractor by the Commonwealth, as well as the amount of damages or compensation determined and awarded to be paid the owners of adjacent property, as aforesaid, shall in each instance be paid by the State Treasurer, on a warrant drawn by the Auditor General, upon the presentation to that officer of a statement setting forth the amount determined to be paid as aforesaid, duly certified by the Commission; said payments to be paid out of any funds specifically appropriated for such purpose, or generally appropriated for the improvement of the roads or highways of the Commonwealth; and in case of a verdict and judgment thereon for the damages or compensation, recorded by any such adjacent property owners upon appeal, the same shall be paid out of any funds appropriated as aforesaid; and any Court of Common Pleas hearing and determining said appeal is hereby authorized and empowered to issue a writ of mandamus to said Commission, the Auditor General, and the State Treasurer, or any of them as the case may require, for the payment of such judgment.

The Commission shall have the right to recover, for and on behalf of the Commonwealth, by due process of law, as debts of like amount are now by law recoverable, from the public service company or companies, or municipal corporations, in such amounts or proportions against each as may be determined by the [\*1412] \*Commission, as aforesaid, the amount of the damages or compensation awarded to the owners of adjacent property by the Commission, or by the court of the proper county on appeal, and the amounts so recovered shall be paid into the state treasury for the improvement of the roads of the Commonwealth.

Section 13. The Commission may," after hearing had upon its own motion or upon complaint, establish such standards of facilities and service of public service companies as shall be reasonably necessary for the safety, accommodation, or convenience of its patrons, employees, and the public; and require, by an order to be served in the manner hereinafter provided upon every public service company affected thereby, the facilities or service of such public service companies to conform to such standards.<sup>78</sup> The Commission shall also have power, after hearing had upon its own motion or upon complaint, to require public service companies to make all such repairs, changes, alterations, additions, extensions,<sup>80</sup> and improvements,<sup>79</sup> in and about their facilities and

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77. The legislature has the power to leave it to the discretion of the Railroad Commission as to the manner in which, the time when, and the place where, specific facilities shall be furnished; a precaution against the abuse of such discretion being provided by permitting an appeal to the courts. *Crosbyton-Southplains R. Co. v. R. R. Com.* (Tex.), 169 S. W. 1038.

78. See Rules and Regulations governing gas, electric, heating and water service, 1 P. C. R. 153-178.

79. (a) Necessary improvements must be made even though the company be not receiving a fair return upon its investment. *Zook v. Turnpike Co.*, 2 P. C. R. 149.

(b) Improvements necessary to secure an adequate supply of pure water were ordered by the Commission, even though the company was operating at a loss. *Ernst v. Glenside Water Co.*, 2 P. C. R. 119.

80. (a) The Commission has the power to compel a public service company to extend its facilities and service into every portion of the municipality in which it is authorized by its charter to do business; but has no power to compel the making of an extension beyond the points covered by the charter. *City of Scranton v. Scranton Rys. Co.*, 2 P. C. R. 689.

service, as shall be reasonably necessary and proper for the safety, accommodation,<sup>81</sup> convenience, and service of their patrons, employees,<sup>82</sup> and the public.<sup>83</sup>

Section 14. The Commission shall have power, of its own motion or upon complaint, to institute any inquiry or investigation, and to determine, upon hearing or rehearing had for that purpose, whether any public service company has, after the date when this act shall become effective, issued or made any increase in the issue of any stocks, trust certificates, bonds, notes, or other evidences of indebtedness or other securities, whether such bonds, notes, or other evidences of indebtedness, or other securities be payable at periods of more or less than twelve months, in violation of any of the provisions or requirements of this act; and, if so, to determine and find the nature and extent of such violations,

(b) The right of inhabitants of a municipality to compel service to them by a water company through an extension of its system, is not an absolute and unqualified right, but is to be determined by a consideration of the reasonableness of the demand therefor. *Lukrawka v. Spring Valley Water Co.* (Cal.), 146 Pac. 640.

(c) A water company whose supply is limited can not be compelled to extend its mains to territory it never undertook to serve. *Van Dyke v. Geary*, 218 Fed. 111.

(d) A state commission cannot compel a natural gas company to extend its lines into another state to secure a larger supply of gas. *Fidelity Title & Trust Co. v. Kansas Nat. Gas Co.*, 219 Fed. 614.

(e) The state may compel an extension or an improvement, even though it be unremunerative, if the circumstances warrant such an order. *Crosbyton-Southplains R. Co. v. R. R. Com.* (Tex.), 169 S. W. 1038.

81. A railroad company is under no obligation to furnish scales with which to weigh live stock. *Gt. N. Ry. Co. v. Minnesota*, U. S. Adv. Ops. 1914, 753, 59 L. Ed. —.

82. Congress has so far legislated upon the matter of safety appliances as to exclude state regulation so far as applied to cars moving in interstate commerce. *So. R. Co. v. R. R. Com.*, 236 U. S. 439, 59 L. Ed. —.

83. (a) See Art. II, Sec. m, and Art. V, Sec. 17.

(b) The remedy for inadequate or unsatisfactory service is by complaint to the Commission, not by encouraging competition. *Borough of Exeter's Petition*, 2 P. C. R. 52 and 539; *Borough of Avoca's Petition*, 2 P. C. R. 372. For full discussion of effects of competition see *Idaho Power & Light Co. v. Blomquist* (Idaho), 141 Pac. 1083.

(c) Public siding and non-agency station will be ordered where required by the needs of the public. *Blough v. B. & O. R. R. Co.*, 2 P. C. R. 84.

and, subject to the provisions for rehearing and appeal, shall certify the record of such hearing and finding to the attorney general to institute, in the name of the Commonwealth, such proceedings in equity or law, civil or criminal, as shall be necessary or proper to enforce the provisions of this act, and to restrain and prevent such public service company from consummating or continuing any act or acts alleged to have been done or to be contemplated in violation of the provisions or requirements of this act or of the laws or Constitution of the Commonwealth.

Section 15. The Commission may, and shall after hearing had upon its own motion or upon complaint, establish, by an order to be served as hereinafter provided upon every public service company affected \*thereby, a system of accounts to be used by such public service companies; and may also, in its discretion, prescribe the manner and form in which accounts, records, and memoranda shall be kept by public service companies,<sup>84</sup> including the accounts, records, and memoranda of the conveyance of passengers and property, and a proper and reasonable depreciation account, as well as the receipts and expenditures of money. And the Commission may classify public service companies, and prescribe the system of accounts to be adopted and used by each class, and may prescribe the manner and form in which such accounts shall be kept, and may subdivide each class according to the volume of business transacted, or otherwise. And the Commission shall have power, upon application, to relieve any public service company from the duty of carrying a depreciation account.

The Commission may, and shall after hearing had as aforesaid, prescribe the accounts in which particular outlays and receipts shall be entered, charged, or credited.

The Commission may also, after hearing as aforesaid, require that no expenditures shall be charged to any operating account that should properly be charged to the capital account, or vice versa; and require that all and every the receipts and expenditures of public service companies be properly apportioned among the various accounts which it may establish.

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84. Where the books of a company had been poorly kept, it was required to revise its system and to submit a copy of its balance sheet to the Commission annually for two years. *Mehard v. New Wilmington W. S. Co.*, 2 P. C. R. 272.

The Commission shall at all times have access to all accounts, records, and memoranda kept by public service companies; and may designate any of its officers or employees, who shall thereupon have authority to inspect and examine any and all accounts, records and memoranda kept by such public service companies.<sup>85</sup> The Commission shall also have power to require the making and filing with it of all reports, records, maps,<sup>86</sup> documents, data, and information, whenever it deems the same necessary and proper in the public interest or to carry out the provisions of this act: Provided, That where any municipal corporation is engaged in rendering or furnishing to the public any service of the kind or character rendered or furnished by public service companies, the provisions of this section shall apply to said municipal corporation with respect to such service. And provided further, That in case of any public service company subject to the jurisdiction of the Interstate Commerce Commission, the systems of accounts, records, and memoranda prescribed by the Commission shall conform to those prescribed by the Interstate Commerce Commission.

Section 16. The Commission shall have power to prescribe the form of the tariffs and schedules required to be filed and posted [\*1414] and published by public \*service companies under this act;<sup>87</sup> and the rules and regulations as to the filing, posting, and publishing, and the manner and places of posting and publishing thereof, in the case of public service companies also subject to the

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85. (a) Same provision in the Interstate Commerce Act was held not to include the correspondence of the company. *U. S. v. Louisville & N. R. Co.*, 236 U. S. 318, 59 L. Ed. —, affirming 212 Fed. 486.

(b) Under similar provisions of Idaho statute, held: the commission has power to examine all the records of a company, and to compel the production at a hearing of such as are relevant to the issue, but it cannot compel a company to throw all its records open to the inspection of a complainant, irrespective of their relevancy to the issue raised. *Federal Mining & Smelting Co. v. Pub. Ut. Com. (Idaho)*, 143 Pac. 1173. Cf. *U. S. v. Nashville, C. & St. L. Ry.*, 217 Fed. 254.

86. Where a water company had no accurate plan of its facilities, it was required to make a map showing its pipe lines, etc., and file a copy of the same with the Commission. *Mehard v. New Wilmington W. S. Co.*, 2 P. C. R. 272.

87. See Rules and Regulations governing form of tariffs and schedules. Circular 5, 1 P. C. R. 44.

Interstate Commerce Commission, shall conform as nearly as practicable to those prescribed by the Interstate Commerce Commission.

Section 17. If the Commission shall find it necessary and proper to the rendering of reasonably safe and adequate or sufficient service, it may, and shall after hearing had upon its own motion or upon complaint, make an order, to be served as herein-after provided upon every common carrier to be affected thereby, requiring all such common carriers to revise and change the time schedules of such common carriers; to alter the running time of trains,<sup>88</sup> cars, vehicles, or boats, or changes in the routes of street railway lines or systems; or regulating or requiring the furnishing<sup>89</sup> and distribution of cars, trains, vehicles, boats, motive power, or other facilities, without undue or unreasonable discrimination or preference between shippers, localities, or competitive or non-competitive points; and the switching, loading, and unloading of said trains, cars, vehicles, boats, or other facilities; the weighing or billing of cars and of property offered for shipment; or regulating demurrage charges,<sup>90</sup> track storage charges, package-room or baggage-room charges, and package or baggage transfer rates and charges; and, generally, to make such other arrange-

88. See note 43, ante, Art. II, Sec. m.

89. (a) Where the furnishing of the service petitioned for would involve a net loss of \$25.00 per day, the Commission will not order the installation of such service. *Minera, etc., v. P. & R. Ry. Co.*, 1 P. C. R. 99.

(b) A statute requiring that every village having 200 inhabitants, or more, and a post office, and within one-eighth of a mile of a railroad, must be given by such railroad the accommodation of one passenger train each way, each day, if trains be run to that extent, and at least two trains, if four or more passenger trains be run, is void as an unreasonable burden on interstate commerce. *Chi., B. & I. R. Co. v. R. R. Com.*, 237 U. S. 220, 59 L. Ed. —.

90. (a) See note 73, B, II, ante, Art. III, Sec. 1, a.

(b) In re scope of the general demurrage rules, see *Pittsburgh Plate Glass Co. v. P. R. R. Co.*, 2 P. C. R. 530 and 695, and *Crucible Steel Co. v. P. R. R. Co.*, Id. 599.

(c) Where a shipper contracted to pay the expense of building a spur track and agreed that title to it should remain in the carrier, private cars standing on the spur track are liable to demurrage. *Norfolk & Western Ry. Co. v. Swift & Co.*, 56 Pa. Super. 471.

ments and improvements in service and facilities as shall be just and reasonable, having due regard to the needs of the public under all the circumstances presented.<sup>91</sup>

Section 18. When application shall be made to the Commission<sup>92</sup> by any proposed public service company for the approval by said Commission<sup>93</sup> of its incorporation, or organization, or creation;<sup>94</sup> or by any public service company for the approval by the Commission of the renewal of its charter, or the obtaining of any additional rights, powers, franchises, or privileges by any amendment or supplement to its charter, or otherwise;<sup>95</sup> or for permission from the Commission to begin the exercise of any right, power, franchise, or privilege;<sup>96</sup> or for the approval by the Commission of the sale,<sup>96</sup> assignment, transfer, lease, consolidation, or merger<sup>97</sup> of any of its powers, franchises, or privileges

91. (a) Where the needs of the public demand it, a railroad company operating a six mile branch line for the use of one consignee will be required to erect a public siding and station. *Blough v. B. & O. R. R. Co.*, 2 P. R. C. 84.

(b) See Art. V, Sec. 13, ante, and notes thereto.

92. Full reports of Applications for Certificates of Public Convenience in 1 P. S. C. Rep. Appendices "E" and "F," 249-372.

93. The constitutionality of this act cannot be questioned by one who seeks the approval of the Commission established by it. *Petition of the City of Williamsport*, 2 P. C. R. 639. Cf. *State v. Pub. Ser. Com.* (Mo.), 168 S. W. 1156.

94. (a) See Rules of Practice and Procedure, Rule 24, 2 P. C. R. 12.

(b) A corporation duly incorporated prior to the approval of the Public Service Company Law has the right to begin the exercise of its rights and powers without the approval of the Commission, even though it did not exercise said rights until after the said law went into effect. *Penna. Utilities Co. v. Lehigh Nav. Elec. Co.*, 2 P. C. R. 74, affirmed 2 P. C. R. 422.

95. See Rules of Practice and Procedure, Rule 26. 2 P. C. R. 15.

96. The power of the commission extends only to the approval of a sale that will be for the benefit of the public, and is to be exercised only on application of the vendor. It cannot compel the execution of a contract of sale entered into where the application for approval is made by the vendee in order to compel a transfer. *Hanlon v. Eshleman* (Cal.), 146 Pac. 656.

97. (a) The merger of continuous lines of railroads has become a part of the settled policy of the law of Pennsylvania, and such merger should be approved unless it be shown to be within some prohibition of the law, to work injustice to vested rights, or be of disadvantage to the public. *Petition of L. S. & M. S. Ry. Co. et al.*, 2 P. C. R. 377.

with any other corporation or person;<sup>98</sup> or when application shall be made to the Commission by any public service company for the approval by the Commission of the purchase, acquisition, taking, or holding, either in absolute ownership or in pledge or as collateral security, directly or indirectly, of any controlling right, title, or interest, legal or equitable, to or in the capital stock, trust [\*1415] certificates, bonds, or other evidences of indebtedness \*or other securities, or other controlling right, title, or interest whatsoever, in any other public service company;<sup>99</sup> or when application shall be made to the Commission by any telegraph corporation, or person or persons engaged in the public telegraph business, for the approval by the Commission of the connection of its or his lines of telegraph with the lines of any other such telegraph corporation, or person engaged in the public telegraph business; or when application shall be made to the Commission by any telephone corporation, or person engaged in the public telephone business, to connect, use, and interchange its or his lines, facilities, and service with the lines, facilities, and service of any other such telephone corporation, or person engaged in the public telephone business; and for the determination by the Commission of the just compensation, terms, and conditions of such connection, use, and interchange; or when application shall be made to the Commission for the approval of the construction, alteration, relocation, or abolition of any crossing at grade,<sup>1</sup> or above<sup>2</sup> or below grade;<sup>3</sup>

(b) Where a merger will not seriously interfere with the business of the protestant and will result in more economical and efficient operation by the petitioners, the merger will be approved. Application of the East Penn Gas Light Co., 2 P. C. R. 688.

98. See Rules of Practice and Procedure, Rule 28. 2 P. C. R. 18.

99. See Rules of Practice and Procedure, Rule 29. 2 P. C. R. 20.

1. (a) A grade crossing over a much travelled city street will not be approved except on certain and convincing evidence of a public necessity for it. Petition of Cornwall & Lebanon R. R. Co., 2 P. C. R. 388. Persons petitioning for a grade crossing have a heavy burden of proof resting upon them. Appeal of C. V. R. R. Co., 245 Pa. 107, 91 Atl. 254.

(b) Where application was made for approval of three grade crossings of the tracks of one railroad over those of another within the switching yard of a large industrial plant, it appeared that the proposed crossings would afford passengers and freight accommodations not otherwise enjoyed, that the proposed route was the only practicable one by which petitioner could reach the plant, and that none of the crossings would be



or when application shall be made to the Commission by any public service company for any approval under any of the provisions of this act;<sup>4</sup> or when application shall be made to the Commission by any municipal corporation for the approval required by the provisions of article three, section three (d), of this act,<sup>5</sup>—such approval, in each and every such case, or kind of application, shall be given only if and when the said Commission shall find or determine that the granting or approval of such application is necessary or proper for the service, accommodation, convenience, or safety of the public.<sup>6</sup>

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main line crossings, and it was held that the construction of the crossings should be approved subject to such modifications and conditions as the Commission deemed necessary for public safety. *Application of Gaffney & James Cy. R. Co.*, 2 P. C. R. 112.

2. *Borough of Butler's Petition*, 2 P. C. R. 65; *Wilkes-Barre v. L. V. R. R. Co.*, 2 P. C. R. 278; *Application of Wilkes-Barre Connecting R. R. Co.*, 2 P. C. R. 470; *In re Grade Crossings, etc.*, 2 P. C. R. 593.

3. (a) See Rules of Practice and Procedure, Rule 33. 2 P. C. R. 23.

(b) The Commission may approve a crossing of electric facilities for the purpose of furnishing power only, and not for the purpose of furnishing light. *Application Docket No. 12*, 1 P. S. C. Rep. 341.

4. See Rules of Practice and Procedure, Rule 37. 2 P. C. R. 29.

5. See Rules of Practice and Procedure, Rule 25. 2 P. C. R. 14.

6. See Art. III, Sec. 11, ante, and notes thereto.

**A. SCOPE OF COMMISSION'S AUTHORITY.** (a) A municipality desiring to extend its water mains into territory which is supplied by a public service company furnishing service of a like character, will be restrained by injunction until it secures the approval of the Public Service Commission. *Bethlehem City Water Co. v. Borough of Bethlehem*, 1 P. C. R. 227.

(b) This is an exercise of the power of the state to determine whether the rights and interests of the general public will be advanced. It is an entirely different power from that of the local control of streets. *Oro Elec. Corp. v. R. R. Com. (Cal.)*, 147 Pac. 118.

(c) The legislature has power to regulate competition in the public interest. *Idaho Power & Light Co. v. Blomquist (Idaho)*, 141 Pac. 1083, 1088.

**B. CONSIDERATIONS AFFECTING APPROVAL.** 1. **Competition.** (a) "History and experience have clearly demonstrated that public convenience and the necessities of the community do not require the construction and maintenance of several plants of the same character to supply the same locality, but only the maintenance of a sufficient number to meet the public demands." *Idaho Power & Light Co. v. Blomquist*

(Idaho), 141 Pac. 1083, 1090. "Unregulated competition is the tool of unregulated monopoly." *Id.* 1091.

(b) Where a public service company had served a borough efficiently for twenty-nine years and had an adequate plant, a new company, without plant or facilities, petitioned for approval of a contract with the borough to enter upon the streets, erect poles, etc., and furnish light, heat and power. Held: That approval of the contract between the new company and the borough should be withheld. Under such circumstances the public interests of the community will, in all probability, be better served, and expensive, inconvenient and wasteful duplication of facilities avoided, by refusal of the application. *Schuylkill L., H. & P. Co.'s Petition*, 1 P. C. R. 122; *Idaho Power & Light Co. v. Blomquist*, *supra*.

(c) The Commission is not justified in permitting competition, nor taking such action as to invite it, unless the area and population served, the needs of the community, or the prospects of the municipality, reasonably show that the public welfare demands it. The power to regulate a public utility by law is corollary to the duty to protect its property and the interests of the public and investors from unnecessary and ruinous competition. *Application of Harmony Elec. Co.*, 2 P. C. R. 42; *Borough of Avoca's Petition*, 2 P. C. R. 372; *Petition of Lehigh Nav. Elec. Co.*, 2 P. C. R. 413; *Petition of Twp. of Jenkins*, 2 P. C. R. 680; *Petition of East End Elec. L., H. & P. Co. et al.*, 2 P. C. R. 714. The Commission cannot approve competition, knowing that when it is called upon to fix rates it will be compelled to provide for a return upon an investment unnecessarily made. *Borough of Exeter's Petition*, 2 P. C. R. 52; *Petition of Twp. of Jenkins*, *supra*; *Idaho Power & Light Co. v. Blomquist (Idaho)*, 141 Pac. 1083.

(d) When a small community is receiving unsatisfactory service, the remedy to be pursued is by complaint to the Commission, as provided for in Art. V, Sec. 2, *ante*, and Art. VI, Sec. 6, *post*, and not by encouraging competition by granting franchises to other companies. *Borough of Exeter's Petition*, 2 P. C. R. 52 and 539; *Borough of Avoca's Petition*, 2 P. C. R. 372.

(e) But artificial and natural gas are essentially different commodities, and the Commission will not restrain competition between them. *Application of People's Nat. Gas Co. et al.*, 2 P. C. R. 620.

(f) The whole theory of the Public Service Commission Law is opposed to the idea that the public will be better served with two lines of road lying closely parallel, where one road will amply suffice. The purpose of this law is to require adequate and safe service at a reasonable price, and without discrimination. When the public is afforded such a service, its needs are satisfied, and no citizen can justly complain. *Day v. Tacoma Ry. & P. Co. (Wash.)*, 141 Pac. 347; *Sherwood v. Atlanta, etc., R. Co.*, 94 Va. 291, 26 S. E. 943.

(g) If it were necessary it might be judicially noticed that one road is

ample to serve the needs of the public between two towns. *Day v. Tacoma Ry. & P. Co.*, supra.

(h) But where a company which has been supplying street lighting for a borough refuses, upon the expiration of its contract, to enter a bid for continuance of such service, the Commission will approve a contract with a competing company. *Borough of Exeter's Petition*, 2 P. C. R. 60.

II. Local Conditions. (a) The extension of a trolley line will not be approved in the absence of sufficient data showing the population to be served and the traffic to be secured. In the exercise of its discretion the Commission will consider the population and the industries to be served, and the likelihood of a reasonable return upon the investment to be made. The fact that individuals are willing to risk their money in the enterprise is not sufficient to justify approval of it. *Application of Reading, &c., R. R. Co.*, 2 P. C. R. 536.

(b) Where it would require four months or more for a protesting company to provide the facilities necessary for the execution of a contract for street lighting, where it was uncertain whether the city could secure light during this interval, and where the difference in the amount of the bids was small, a contract awarded to the company that had furnished satisfactory service to the city under a previous contract, was approved. *City of Pittston's Petition*, 2 P. C. R. 103.

(c) The Commission, in determining questions affecting the interests of municipalities, gives much weight to the conclusions reached by their officers charged with the duty of protecting those interests. Where nine of twelve councilmen approved an ordinance granting a franchise for the extension of the line of a street railway company, and other evidence showed a necessity for the extension, the Commission gave its approval. *Petition of Phoenixville, &c., Ry. Co.*, 2 P. C. R. 191. Cf. *Application of Raystown Water Power Co.*, 2 P. C. R. 483.

III. Questions of Law. (a) Where the Commission finds a corporation furnishing service under an accepted right, it will not inquire into the authority of the corporation, under its charter, nor the legality of a merger by which it claims to have acquired that right. *Borough of Avoca's Petition*, 2 P. C. R. 372. Whether a contract between a municipality and a public service company was awarded to the lowest responsible bidder, within the meaning of legislation relating to advertisement and competitive bidding, is purely a legal question for the courts and not for the Commission. *City of Pittston's Petition*, 2 P. C. R. 105. The Commission will not, however, approve a contract between a municipality and a company where such contract is void because contrary to statute. *Petition of City of Williamsport*, 2 P. C. R. 639.

(b) Approval of the operation of a trackless trolley company was refused on the ground that, being unregulated by any existing law, it would not be proper for the safety and convenience of the public. *Perkiomen Elec. Transit Co.'s Petition*, 2 P. C. R. 334.

Section 19. For the purpose of enabling the Commission to make such finding or determination it shall hold such hearings, which shall be public, and subpoena and examine such witnesses, and compel the production of and examine such books, papers, contracts, or other documents, and make such inquiries, physical examinations, valuations, and investigations as it may deem necessary or proper, in enabling it to reach a determination. Due notice of every such hearing shall be given, and in every case the Commission shall make a finding or determination in writing, stating whether or not its approval is given and, if given, shall issue its certificate, to be known as its Certificate of Public Convenience, under its seal, and file among its records a duplicate of every such certificate.<sup>7</sup>

Section 20. (a) The Commission shall have power, upon application or upon its own motion, to ascertain and determine the [\*1416] fair value of the property of every \*public service company in this Commonwealth, and to determine any matter in connection therewith; and shall exercise the said power whenever the same is required, or whenever it shall deem such valuation or determination necessary or proper under any of the provisions of this act.<sup>8</sup>

In ascertaining and determining such fair value, the Commission may determine every fact, matter, or thing which, in its judgment, does or may have any bearing on such value; and may<sup>9</sup> take into consideration, among other things, the original cost of construction, particularly with reference to the amount expended

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7. This section applies to municipal corporations. *Bethlehem City Water Co. v. Borough of Bethlehem*, 1 P. C. R. 227, 231.

8. (a) See Art. II, Sec. k, ante.

(b) Where the books of a company were so poorly kept that they did not show the value of the property, the Commission ordered an appraisal of the physical valuation. *Mehard v. New Wilmington W. S. Co.*, 2 P. C. R. 272.

(c) In determining whether particular rates are reasonable, and especially in deciding whether particular rates are unjustly discriminatory or unduly preferential, it is discretionary with the Commission whether a valuation of any or all of the property of a public service company shall be made, and, if the Commission decides that a valuation is necessary, the statute prescribes what the Commission may, not what it must consider, in arriving at a fair valuation. *Penna. Rubber Co. v. P. R. R. Co.*, 2 P. C. R. 31.

in the existing and useful permanent improvements; with such consideration for the amount in market value of its bonds and stocks, the probable earning capacity of the property under particular rates prescribed by statute or ordinance, or other municipal contract, or fixed or proposed by the Commission, and for the items of expenditures for obsolete equipment and construction, as the circumstances and the historical development of the enterprise may warrant; the reproduction costs of the property, based upon the fair average price of materials, property, and labor, and the developmental and going concern value of such public service company; and these, and any other elements of value,\* shall be

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9. (a) If the valuation of any one of the necessary elements of a public service plant is fixed by the rate making authorities at an amount unjustly and unreasonably low in a substantial amount, or if the value of an element of substantial value used and useful in maintaining or operating such a plant is entirely omitted by the rate making authority, such unreasonable and unjust valuation, or omission of valuation, is the taking of private property for a public use without just compensation. *Bonbright v. Geary*, 210 Fed. 44, 48; *People v. Willcox*, 104 N. E. 911, 210 N. Y. 479. But if the elements omitted are so small as not to affect the result appreciably, it is otherwise. *Van Dyke v. Geary*, 218 Fed. 111.

(b) In the absence of proper books showing property accounts, and after an inspection of the books of the company by the Commission's Accountant and of the physical property by the Engineer, the reproduction cost new, less depreciation and less the value of abandoned property, was taken as the proper basis for rate making. *Curry v. Emlenton Water Co.*, 2 P. C. R. 613.

(c) The cost of taking up and replacing pavements on streets which were unpaved when gas mains were laid, should not be added to the valuation of a property based on the cost of reproduction new, less depreciation. *Des Moines Gas Co. v. Des Moines*, U. S. Adv. Ops. 1914, 811, 59 L. Ed. —.

(d) In making a valuation of a water system for rate making purposes, an item of \$38,400, given as the value of 189 acres of land which formed a "water-shed" supplying the water, was properly excluded. So also a valuation of \$43,884, placed upon the strips of land in which mains were laid, which was based on the number of square feet in the strips at a value per square foot equal to that of abutting property. *Van Dyke v. Geary*, 218 Fed. 111.

(e) Where a long established and successful plant is valued for rate making purposes, and the value of the property is based upon a plant in successful operation, and overhead charges have been allowed for promotion, organization and development expenses, the element of "going con-

given such weight by the Commission as may be just and right in each case.

(b). The Commission shall also have power to make revaluations of the property of any public service company, from time to time, and to ascertain and determine the value of new construction, extensions, and additions to the same.

(c). The Commission shall have power to establish reasonable general or special rules with respect to the preparation of such valuations, the forms to be followed, the inventories and statements and proofs of original cost to be made, and all other matters, figures, data, and information in connection therewith.

Section 21. When application shall be made to the Commission by any public service company for the ascertainment and determination of the amount paid or agreed to be paid to the Commonwealth, or any political subdivision thereof, as the consideration for the grant of any franchises, rights, powers, privileges, or right to own or operate or enjoy any such franchises, rights, powers, or privileges; or for the ascertainment and determination of the aggregate values of the properties of any public service companies consolidated or merged; or for the ascertainment and determination of the value of the property of any public service company reorganized, under the provisions of \*an act of Assembly approved the eighth day of April, one thousand eight hundred and sixty-one, entitled "An act concerning the sale of railroads, canals, turnpikes, bridges, and plank roads," or any supplement thereto or amendment thereof; or for a certificate that the provisions of paragraph (a) of section four of article three of this act, relating to the issuing of stocks or making any increase in the issue thereof by public service companies, have been complied with; or for the ascertainment and determination of the value of any property or labor, for which any bonds, notes, or other evidences of indebtedness, running for more than twelve months, are issued; or for the ascertainment and determination of the value of any other fact, matter, or thing of which the Commission is authorized to ascertain and determine the value under the terms of this act,—then, and in every such case, for the pur-

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cern" value has been given adequate consideration. *Des Moines Gas Co. v. Des Moines*, U. S. Adv. Ops. 1914, 811, 59 L. Ed. —.

pose of making such ascertainment or determination of value, the Commission shall hold such hearings, which shall be public, and subpoena and examine such witnesses, and compel the production of, and examine, such books, papers, or other documents, and make such inspection, inquiries, physical examinations, valuations, and investigations, as it may deem necessary or proper to enable it to reach a determination. Due notice of every such public hearing shall be given, and in every such case the Commission shall make a finding or determination in writing, stating the value ascertained by the Commission, and shall issue its certificate, to be known as its Certificate of Valuation, under its seal, and file among its papers a duplicate of every such certificate. Any such findings or determinations shall be subject to the right or [of] rehearing and appeal, as hereinafter provided.

The issuing by the Commission of any Certificate of Public Convenience or any Certificate of Valuation, enumerated or provided for in this act, or any finding, determination, or order made by the Commission, refusing or granting such certificates, shall not be construed to revive or validate any lapsed, terminated, invalidated, or void powers, franchises, rights, or privileges; or to enlarge or add to the rights, powers, franchises, or privileges contained in any charter, or in the grant of any franchises or any supplement or amendment to any charter, or to waive or remit any forfeiture. The issuing by the Commission of any Certificate of Valuation, enumerated or provided for in this act, shall be deemed to certify only to the fact that said securities were issued for money, labor done, or money or property actually received; and shall not be taken as requiring the Commission, in any subsequent valuation of the property of any public service company, [\*1418] for the purpose of ascertaining the \*amount to be paid to said public service company for its property, to fix a valuation which shall be sufficient to yield a return to the holders of said securities; neither shall said Certificate of Valuation be deemed to require the Commission, in subsequently determining the rates to be charged for the service of said public service company, to provide a rate which shall be sufficient to yield a return on said securities.

Section 22. The Commission shall have full power and authority to require public service companies to report or account to the

Commission for the disposition and application of the proceeds of all sales or pledges of all stocks, trust certificates, bonds, notes, and other evidences of indebtedness or other securities, which accounts and reports shall be made in such form and detail as to the Commission may seem advisable, and in accordance with reasonable rules and regulations which may be adopted by the Commission.

Section 23. The Commission shall have full power and authority, either by or through its members, agents, or employees, duly authorized by it, whenever it shall deem it necessary or proper for the purposes of determining whether it shall issue any Certificate of Public Convenience or Certificate of Valuation, or for the purpose of investigating the safety, adequacy, and sufficiency, or reasonableness, of any service or rates, fares or charges, of any public service company,<sup>10</sup> or in carrying out of any of the provisions of this act, to enter upon the premises, buildings, machinery, system, plant, and equipment, and make any inspection, valuation, physical examination, inquiry, or investigation of any and all plant and equipment, facilities, property, and pertinent<sup>11</sup> books, papers, memoranda, documents, or effects whatsoever, of any public service company, and to hold any hearing for such purposes.<sup>12</sup> In making such valuations or revaluations, the Commission may have access to and use any books, documents, or records in the possession of any department or board of the Commonwealth or any political subdivision thereof.

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10. Under the New York statute a person engaged in conducting a parcel room in a station is not engaged in public service, and can not be compelled to produce his books and records in order to determine what profits he made. *In re Pub. Ser. Com. 1st Dist.*, 214 N. Y. 46, 108 N. E. 94, affirming *In re Mendel*, 147 N. Y. Suppl. 603.

11. *U. S. v. Louisville & N. R. Co.*, 236 U. S. 318, 59 L. Ed. —, affirming 212 Fed. 486.

12. Under similar provisions of Idaho statute, held: The Commission has power to examine all the records and papers of a company, and, in a contest between a party and a company, has power to compel the production of any records, papers, etc., bearing upon the issues in the case, and it will allow reasonable time for examination of all such relevant records by the other party; but it does not have power to compel a company to throw open all its records and papers to the inspection of a party complaining. *Federal Mining & Smelting Co. v. Pub. Ut. Com. (Idaho)*, 143 Pac. 1173.



Section 24. The Commission shall as a Commission, or by its individual members, have the power in any part of the Commonwealth to subpoena witnesses, to administer oaths, to examine witnesses, or to take such testimony, or compel the production of such books, papers, and documents, as it may deem necessary or proper in and pertinent to any proceeding, investigation, or hearing held or had by it, and to do all necessary and proper things and acts in the lawful exercise of its powers or the performance of its duties.

Section 25. The Commission may require every public service company subject to its jurisdiction to file with it a copy of its reports as filed with the Interstate Commerce Commission of the United States; and as to all public service companies subject to this act, and not subject to the Interstate Commerce Commission, may require that such public service companies file reports in the form prescribed by the Commission.

Section 26. The Commission may make such rules and regulations, not inconsistent with the law, as may be necessary or proper in the exercise of its powers or for the performance of its duties;<sup>13</sup> and whenever the Commission shall determine it to be necessary, in the interests of the public, to withhold from the public any facts or information obtained during the progress of any investigation, such facts and information may be so withheld.

Section 27. In addition to the foregoing expressly enumerated powers, the Commission shall have full power and authority, and it shall be its duty, to enforce, execute, and carry out, by its orders, rulings, regulations, or otherwise, all and singular the provisions of articles two and three of this act, relating, respectively, to the duties and limitations, and to the creation and the powers, and limitations of the powers, of public service companies; and, all and singular, the other provisions of this act, and the full intent thereof; and shall have the power to rescind or modify any such orders, rulings, or regulations.<sup>14</sup>

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13. (a) *Adrian Furnace Co. v. P. R. R. Co.*, 2 P. C. R. 63a.

(b) For Rules of Practice and Procedure, see 2 P. C. R. 1-31.

14. (a) The Interstate Commerce Commission, being an administrative body, is not restricted in its procedure by the technical rules that prevail in tribunals that are entirely judicial. *Phila. & Reading Ry. v. U. S.*, 219 Fed. 988.

Section 28. The enumeration of the powers of the Commission, as herein set forth, shall not exclude any power which the Commission would otherwise have under any of the provisions of this act.

Section 29. Except as herein otherwise expressly provided, none of the powers or duties conferred or imposed by this act upon the Commission, and none of the orders, regulations, rules, or certificates made or issued by the Commission, and none of the duties, powers, or limitations of the powers, conferred or imposed by this act upon public service companies, or the performance or exercise thereof, shall be construed in anywise to abridge or impair any of the obligations, duties, or liabilities of any public service company in equity or under the existing common or statutory law of the Commonwealth; but all such obligations, duties, and liabilities shall be and remain as heretofore. And, except as herein otherwise provided, nothing in this act contained shall in any way abridge or alter the existing rights of action or remedies in equity or under the common or statutory law of the Commonwealth, it being the intention that the provisions of this act shall be cumulative, and in addition to such rights of action and remedies.<sup>15</sup>

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(b) This Act does not give the Commission the power to control or supervise municipal legislation, or its consequences. If a city council exceeded its powers by passing an ordinance requiring a water company to install meters for consumers at its own expense, the remedy for the company is in the courts. *York Water Co. v. City of York*, 2 P. C. R. 185. See also *Same v. Same*, 28 York L. R. 193, and *City of York's Appeal* (in Supreme Court), 29 York L. R. 13.

(c) In disposing of the business of the Railroad Commission, the Public Service Commission is authorized to use all the powers conferred upon it by this Act. *Penna. Paraffine Works v. P. R. R. Co.*, 2 P. C. R. 513. Where the Railroad Commission declared a rate unreasonable and prescribed a reasonable rate which was not put into effect for three months, the Public Service Commission awarded reparation on shipments which moved during that period. *Id.*

15. A court of Northampton County has power to restrain a municipality from extending its plant into territory supplied by a private corporation, where the municipality has not secured the approval of the Public Service Commission. *Bethlehem City Water Co. v. Borough of Bethlehem*, 1 P. C. R. 227.

[\*1420]

## \*ARTICLE VI.

Practice and Procedure Before the Commission<sup>16</sup> and Upon Appeal.<sup>17</sup>

Section 1. All hearings before the Commission or before any commissioner, shall be public; and all hearings, investigations, and proceedings by the Commission shall be governed by such rules, not inconsistent with this act, as shall be adopted and prescribed by the Commission.<sup>18</sup> No individual shall be excused from testifying, or from producing any books, papers, documents, or other evidence, in any investigation or inquiry by or upon any hearing before the Commission or any commissioner, when ordered to do so by the Commission or such commissioner, upon the ground or for the reason that the testimony, books, papers, documents, or other evidence required of him, may tend to criminate him or subject him to penalty or forfeiture. But no individual shall be prosecuted, punished, or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he shall testify or produce books, papers, documents, or other evidence. No individual so testifying shall, however, be exempt from prosecution or punishment for any perjury committed in so testifying; and nothing herein contained shall give, or shall be construed as in any matter giving, unto any individual immunity of any kind from the law, except as herein expressly provided, or as giving unto any corporation immunity of any kind from the law. Any person who shall wilfully and corruptly give any false testimony, under oath or affirmation, in any hearing, investigation, or proceeding before or by the Commission or any commissioner, or before any notary public or other person authorized by the provisions of this act to take such testimony, shall be guilty of a misdemeanor, and punishable by a fine not exceeding five thousand dollars, or imprisonment not exceeding one year, either or both, in the discretion of the court.

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16. An administrative body is not restricted in its procedure by the technical rules that prevail in tribunals that are entirely judicial. *P. & R. Ry. v. U. S.*, 219 Fed. 988.

17. Neither the commission, nor the court on appeals from its orders, is bound by the technical rules respecting the admissibility or relevancy of evidence. *Appeal of City of Norwalk (Conn.)*, 91 Atl. 442.

18. For Rules of Practice and Procedure, see 2 P. C. R. 1-31.

Section 2. The Commission may require copies of books, papers, or abstracts thereof, to be sent to it in any part of the Commonwealth, in all cases in which it would have the right to examine the originals or compel their production before it.<sup>19</sup> All subpoenas issued by the Commission shall be under its seal, and shall be signed by a commissioner or by the secretary, and may be served by any adult in any part of this Commonwealth.

Each witness required to attend before the Commission or a commissioner shall receive for each day's attendance the sum of [\*1421] one dollar and fifty cents, and \*shall receive, in addition, the sum of three cents for each mile circular traveled by such witness, by the usual route, between his home and the place where his presence is required.

All disbursements made in the payment of such fees shall be included in, and paid in the same manner as is provided for, the payment of other expenses of the Commission.

The fees for serving a subpoena shall be the same as those paid the sheriff for similar services. The fees, expenses, and costs of, or in connection with, any hearing may be imposed by the Commission upon any party to the record, or may be divided between any or all parties to the record in such proportions as the Commission may determine.

Section 3. If any individual who shall be subpoenaed to attend before the Commission or a commissioner shall fail to obey the command of such subpoena, or if any individual in attendance before the Commission or a commissioner shall refuse to be sworn or to be examined, or to answer any relevant question, or to produce any relevant book, paper, or document, when ordered so to do by the Commission or a commissioner, the Commission or

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19. Under similar provisions of Idaho statute, held: The commission has power to examine all records and papers of the company, and, in a contest between a party and a company, has power to compel the production of such records as bear upon the issues in the case, and it will allow a reasonable time for examination of such relevant records by the other party, but it does not have the power to compel a company to throw open all its records to the inspection of a complainant, irrespective of their relevancy to the issues raised. *Federal Mining & Smelting Co. v. Pub. Ut. Com.* (Idaho), 143 Pac. 1173.

commissioner may invoke the aid of any court of Common Pleas within this Commonwealth to enforce such attendance and testimony of witnesses, and the production of books, papers, and documents; and such court, on due cause shown, shall issue an order requiring any person to appear before said Commission, or commissioner, and produce books, papers, and other documents, if so ordered, and give testimony touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof, in the same manner as in the case of disobedience of the requirements of a subpoena issued from such courts, or a refusal to testify or produce evidence therein.

Section 4. If such person be an officer, director, or employee of a public service company being a party to the proceeding before the Commission or commissioner, or if any person being an officer, director, or employee of such public service company, shall absent himself from the jurisdiction of the Commonwealth or conceal himself for the purpose of avoiding service of a subpoena; or shall remove relevant books, papers, or other documents out of this Commonwealth for the purpose of preventing their examination by the Commission; or shall destroy or conceal any such books, papers, or other documents for such purpose,—he shall be adjudged guilty of contempt; and the said Court of Common Pleas may impose a fine of not less than one hundred dollars for [\*1422] each day during the continuance \*of such refusal, neglect, concealment, or removal; and if the said court shall find that the neglect, refusal, or concealment, or the removal or destruction of books, papers, or other documents, by such witness, has been occasioned by the advice or consent of such public service company, in anywise aided or abetted by it, then, in default of payment of said fine by the person in contempt, the same shall be paid by said public service company, and may be recovered from it by an action, in the name of the Commonwealth, in the said court of common pleas, as other like fines and penalties are now by law recoverable. Imprisonment for contempt shall be by commitment to the county jail of the county in which such hearing is had.

Section 5. The testimony of any aged, infirm, going, or non-resident witness may be taken before any commissioner, at any time or place, upon not less than forty-eight hours' notice, or be-

fore any notary public or other person authorized to administer an oath, as may be provided by the laws of this Commonwealth, or by any general or special rule of the Commission.<sup>20</sup>

Section 6. Any person or corporation, public service company or municipality, complaining of anything done or about to be done, omitted or about to be omitted, by any public service company, in violation of any of the requirements or provisions of this act, or of any lawful determination, ruling, or order of the Commission, may apply to the Commission by petition,<sup>21</sup> duly verified by the affidavit of the complainant, which shall contain a concise statement of all the material facts upon which the complaint is founded.<sup>22</sup> Said petition shall be filed of record with the Commission;<sup>23</sup> whereupon a copy of the petition thus presented and filed shall forthwith be forwarded by registered mail, by the Commission, to any officer or agent of the public service company or public service companies complained against, accompanied by a

<sup>20</sup>. See Rules of Practice and Procedure, Rule 19. 2 P. C. R. 9.

<sup>21</sup>. (a) The remedy against discriminatory rates is by petition to the commission, not to the court. *State v. Meteline Falls L. & W. Co.* (Wash.), 141 Pac. 1142.

(b) An injunction will not be granted by a court of common pleas to restrain the construction of a crossing made contrary to the terms of a Certificate of Public Convenience. Complaint must be made to the Commission. *Citizens' Elec. Ill. Co. v. Consumers' Elec. Co.*, 2 P. C. R. 426; 17 Luz. L. R. 413.

(c) See *In re Use of Streets*, 2 P. C. R. 127.

<sup>22</sup>. (a) See Rules of Practice and Procedure, Rules 3 and 23, 2 P. C. R. 3, 11.

(b) Proceedings before the commission should raise distinct issues. *Grand Rapids & I. Ry. Co. v. Mich. R. R. Com.* (Mich.), 150 N. W. 154.

(c) Where the complainant refused to make affidavit to the allegations made, and refused to attend the hearing set, the complaint was dismissed. *Stouffer v. Chambersburg, G. & W. St. Ry. Co.*, 2 P. C. R. 89.

(d) "It would be helpful to the effort to reach correct conclusions and save much labor by the Commission, if the parties in their complaints and answers, when they refer to a place of shipment or destination, would give its location, and when they refer to a railroad, would use its corporation title instead of obscure, and often inaccurate, abbreviations." *Cox & Co. v. L. S. & M. S. Ry. Co.*, 1 P. S. C. Rep. 169, 171.

<sup>23</sup>. Reports of all complaints determined by the Public Service Commission from July 26, 1913, to June 30, 1914, will be found in 1 P. S. C. Rep., pp. 181-248.

notice from the Commission calling upon the public service company or public service companies complained against to satisfy the complaint, or to answer<sup>24</sup> the same in writing, within such reasonable time as may be specified by the Commission in said notice.<sup>25</sup>

Section 7. If such public service company, within the time specified, shall satisfy the complaint, the Commission shall dismiss the petition, but said public service company shall be relieved from responsibility only for the specific matter complained of.<sup>26</sup> If such public service company shall not satisfy the complaint within the time specified, and it shall appear to the Commission, from a consideration of the complaint and answer, or otherwise, [\*1423] that reasonable ground exists for \*investigating said complaint, it shall be the duty of the Commission to fix a time and place for a hearing, and to investigate the matter complained of in accordance with the provisions of this act. Notice of the time and place of such hearing shall be given to the petitioner and to the public service company or companies complained against, in such manner as the Commission may prescribe.<sup>27</sup> The testimony shall be taken down by the stenographer appointed by the Commission, and a full and complete record shall be kept of all proceedings had before the Commission or any commissioner on any hearing or investigation.<sup>28</sup>

Section 8. The Commission may also, upon its own motion, and upon such notice as it may deem reasonable under the circumstances, institute any similar inquiry or investigation, and fix a time and place for a hearing, with the same effect as though complaint had been made as aforesaid and satisfaction thereof refused.<sup>29</sup>

Section 9. Where any petition complains, as aforesaid, of any violation of any lawful determination, ruling, or order of the Commission (to be made as hereinafter provided), and it shall

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24. See Rules of Practice and Procedure, Rules 7 and 10, 2 P. C. R. 4 and 6.

25. See Rules of Practice and Procedure, Rule 5, 2 P. C. R. 3.

For Practice and Procedure on Petitions in General, see Rule 38, 2 P. C. R. 30.

26. See Rules of Practice and Procedure, Rule 6. 2 P. C. R. 4.

27. See Rules of Practice and Procedure, Rule 8. 2 P. C. R. 5.

28. See Rules of Practice and Procedure, Rule 9. 2 P. C. R. 5.

29. See Rules of Practice and Procedure, Rule 11. 2 P. C. R. 7.

appear to the Commission that reasonable ground exists for investigating said complaint, and a hearing or investigation is had upon said complaint, the burden of proof shall be upon the public service company complained against to show that the determination, ruling, or order of the Commission has been complied with.

Section 10. Whenever the Commission shall investigate any matter complained of, under the provisions of this act, it shall be its duty to make and file of record a written finding, determination, or order,<sup>30</sup> either dismissing the complaint or directing the public service company or companies complained against to satisfy the cause of complaint, in whole or to such extent and within such time as the Commission may specify, require and order. No complaint shall at any time be dismissed merely because of the absence of direct damage to the complainant,<sup>31</sup> except in cases of petitions for an order directing the payment of damages alleged to have been actually sustained, as provided in article five, section five, of this act.

Section 11. The Commission shall likewise make and file a written finding, determination, or order in all hearings or investigations instituted on its own motion. The Commission may also prepare and file a written opinion with any determination or order.<sup>32</sup>

Section 12. The Commission shall have the power to rescind or modify<sup>33</sup> findings, determinations, or orders made under the [\*1424] provisions of this act, upon such notice and in such manner as it shall deem proper, and may grant rehearing for cause shown.<sup>34</sup>

30. See Rules of Practice and Procedure, Rule 12. 2 P. C. R. 7.

31. After a hearing upon alleged discrimination against a shipping point, the commission may find that there is discrimination against the point of destination, although such has not been alleged. P. & R. Ry. v. U. S., 219 Fed. 988.

32. Where no application for rehearing or appeal is made, the company must notify the Secretary of the Commission of compliance with the order. See Rules of Practice and Procedure, Rule 39. 2 P. C. R. 30.

33. Without the taking of additional testimony, such a modification in an order will not be made as to require carriers of passengers to issue a ticket which they were not issuing at the time of the original hearing. Combined Committee, etc., v. P. R. R. Co. et al., 2 P. C. R. 717.

34. Where a petition is presented praying for a reopening and rehearing of a case decided by the Commission, and, on hearing held upon the



Section 13. Every final order<sup>36</sup> of the Commission shall be served, in any county of the Commonwealth, upon each public service company affected thereby, either by the marshal of the Commission or by an adult person who may be deputized by said marshal for that purpose, in the manner now provided by law for serving a writ of summons upon individuals or corporations; and return of said service shall be made by the person serving said order to the secretary of the Commission, in the manner and form now provided by law for making return of the service of a writ of summons; and a certified copy of said order shall be mailed by registered mail to all other parties to the proceedings in which such order is issued, or their respective attorneys; but the failure of any public service company or of any party to the proceedings to receive such copy shall not prevent the said order from being conclusive, and taking effect on the date specified therein, in accordance with its terms.<sup>36</sup>

Section 14. After any finding, determination, or order shall have been made by the Commission, any public service company or municipal corporation affected thereby, or any party complainant in the proceedings, or any person, corporation, or public service company, or association duly permitted by the Commission, on proper petition and cause shown, to intervene, may apply, within fifteen days after the service of said order, for a rehearing in respect to any matter determined by the Commission in or by its hearing or investigation and order issued therein; and the Commission may grant and hold such rehearing, if in its judgment sufficient cause therefor be shown.<sup>37</sup> All applications for rehearing shall be by petition, specifically setting forth the grounds upon which such application is based.<sup>38</sup>

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petition, it is not shown that any additional testimony is to be presented, the Commission will not reopen the case, but it may modify its original order. Combined Committee, etc., *supra*.

35. A copy of a "finding and determination" of the Commission must also be served on the parties. Rules of Practice and Procedure, Rule 12. 2 P. C. R. 7; Consumer's Elec. Co., appellant, v. Pub. Ser. Com., 2 P. C. R. 288.

36. See Rules of Practice and Procedure, Rule 21. 2 P. C. R. 10.

37. See notes 33 and 34, *supra*.

38. See Rules of Practice and procedure, Rule 13. 2 P. C. R. 7.

Section 15. No application for a rehearing shall in anywise operate as a supersedeas, or in any manner stay or postpone the enforcement of the original or existing order, except as the Commission may by its order direct.

Section 16. After such rehearing, should the same be granted, the Commission may affirm, rescind, modify, or amend its original order. Any order so made after such rehearing shall have the same force and effect as an original order.

Section 17. Within thirty days after filing<sup>39</sup> of any finding or determination by the Commission, or after the date of service of any order,—unless an application for a rehearing may be pending, and then within thirty days after the refusal of such application<sup>[\*1425]</sup>,—or the entry of an order modifying, amending, rescinding, or affirming the original finding, determination, or order, any party to the proceedings affected thereby may appeal therefrom to the *Superior Court*: Provided, That there shall be no appeal from any order for reparation made by the Commission, but the suit may be brought as hereinbefore provided.<sup>40</sup> The said court is hereby clothed with exclusive jurisdiction throughout the Commonwealth for the purpose of hearing and determining any and all said appeals: Provided, That in case of an appeal from the award of damages or compensation by the Commission, under any of the provisions of this act, the appeal shall, in case any party is entitled to demand a jury trial under section eight of article sixteen of the Constitution of this Commonwealth, be to the courts of the proper county thereof, but in all other cases shall be to the said *Superior Court*. If an appeal be made to any court other than the *Superior Court*, the case shall be proceeded with therein in accordance with the practice and procedure made and provided in such cases. In case of any appeal from the award by the Commission of damages or compensation for property taken, injured, or destroyed, where the Commission shall have power to apportion the amount thereof among, or direct the payment thereof by, any public service companies or municipal corporations concerned, any such public service company or municipi-

39. An appeal is good if taken within 30 days from the date of service of the finding and determination upon the appellant. *Consumers' Electric Co., appellant, v. Pub. Ser. Com.* 2 P. C. R. 288.

40. See Art. V, Sec. 5, ante.

pal corporation may intervene and be heard in the trial of such appeal, under such rules and regulations as the court in which the said appeal may be pending shall prescribe. All appeals to the *Superior Court* shall be by petition to said court, setting forth specifically and concisely the error or errors assigned to the finding, determination, or order of the Commission; which petition shall be accompanied by a copy of the original complaint, if any, filed with the Commission, as well as a copy of the ruling, determination, or order of the Commission appealed from; and shall also be accompanied by affidavit of the party or parties appellant, or if its, his, her, or their agent or attorney, that the appeal is not taken for the purpose of delay, but because the appellant or appellants verily believe that injustice has been done. Each error relied on must be specified particularly and set forth in a separate numbered paragraph of the petition. [*Italics from amendment of June 3, 1915.*]

Section 18. The Commission shall be immediately notified in writing by the appellant or appellants of the taking of an appeal, [\*1426] and within thirty days after service of such notice shall certify under its official seal to the proper court of Common Pleas, as hereinabove provided, the record of the said proceedings; which record shall include the testimony taken therein, the findings of fact, if any, of the Commission based upon such testimony, a copy of all orders made by the Commission in said proceedings, and a copy of the opinion, if any, filed by the Commission. The cost of preparing and certifying such record shall be paid to the Commission by the appellant or appellants, and taxed as part of the costs of the case, to be paid as directed by the court upon the final determination of the appeal.

Section 19. No appeal from any order of the Commission (except as hereinafter provided) shall in any case operate as a supersedeas of the order appealed from, unless the aforesaid proper court of Common Pleas shall, by an interlocutory order, make said appeal a supersedeas; which interlocutory order shall be made only after such notice to the Commission and other parties of record as the court may direct, and after a hearing upon said application for an interlocutory order of supersedeas. Upon the granting of a supersedeas upon the application of a public service company in any case (except as hereinafter provided),

the court may, in its discretion, require the filing of a bond to the Commonwealth, for the use of all parties aggrieved, in such sum and conditioned as the court may by its order direct, or may grant the supersedeas upon such other terms and conditions as the court in its discretion may prescribe: Provided, however, That in all cases of appeal by a public service company from an order of the Commission establishing, changing, or altering, or in any manner affecting, the prices, rates, joint rates, tolls, or charges for any service, such appeal shall operate as a supersedeas upon the filing of a bond to the Commonwealth, in the said court, by said public service company, for the use of all parties so damaged by the failure of such company to comply with the order appealed from, during the period of such supersedeas. Said bond to be in such sum as shall be fixed by the court, and with sureties to be approved by the court, shall be conditioned for the repayment to all such aggrieved parties of any excess over the rate or charge fixed by the Commission, which shall be received by such public service company after the making of such order by the Commission, if the said order shall be finally affirmed, and may also contain such further conditions as the court may order and direct.

Section 20. Upon the petition of the Commission the said court [\*1427] may order the complainant or complainants in the original complaint to be added to the record as a party or parties defendant, and such parties shall be permitted to join in the defense of the order of the Commission at issue.

The court may also, upon application by petition and cause shown, permit any person or corporation to intervene in the said proceeding and be added as a party plaintiff or defendant therein.

Section 21. An answer shall be filed by the Commission within thirty days after the service of notice upon it of the taking of an appeal. Leave may also be given by the court to any other party to the record to file an answer. Upon the filing of an answer by the Commission the case shall be considered at issue, and a hearing shall be held before said court as hereinafter provided, without further pleadings. Copies of the petition and answer shall be served upon the opposite party or parties within five days after filing the same.

Section 22. At the hearing of the appeal the said court shall, upon the record certified to it by the Commission, determine

whether or not the order appealed from is reasonable<sup>41</sup> and in conformity with law.<sup>42</sup>

Section 23. In all such cases the orders of the Commission shall be prima facie evidence of the reasonableness thereof,<sup>43</sup> and the burden of proving the contrary shall be upon the appellant or appellants; and the notes or testimony taken before the Commis-

41. (a) Whether an order is reasonable is a judicial question. *State v. Fla. E. C. Ry. Co. (Fla.)*, 67 So. 906.

(b) Questions of policy and expediency can not be considered by the courts. *St. L., I. M. & S. Ry. Co. v. U. S.*, 217 Fed. 80.

42. (a) An order which is unreasonable is unlawful. *N. C. Ry. Co. v. Laird (Md.)*, 91 Atl. 768.

(b) Where a railroad company furnishes at some points facilities which it is under no public duty to furnish, an order of the Commission declaring the practice discriminatory and requiring the installation of similar facilities at other points, without giving an opportunity to remove the discrimination by removing the facilities first installed, takes property without due process of law. *Gt. N. Ry. Co. v. Minnesota*, U. S. Adv. Ops. 753, 59 L. Ed. —.

(c) An order of a state commission imposing a penalty of \$6,300 for alleged discriminations, takes the company's property without due process of law, where the practice complained of had not been declared discriminatory by statute or order and had been done in good faith. *S. W. Tel. & Tel. Co. v. Danaher*, U. S. Adv. Ops. 1914, 886, 59 L. Ed. —.

(d) Regulation requiring street cars to be cleaned and fumigated weekly, and platforms to be kept clear, are reasonable. One requiring a temperature of not less than 50 degrees to be maintained in street cars, is unreasonable. *S. Covington & C. S. R. Co. v. Covington*, 235 U. S. 537, 59 L. Ed. —.

(e) See note 30, c, ante, Art. V, Sec. 1.

(f) See note 48, post, Art. VI, 31.

43. (a) Only the reasonableness and lawfulness of an order may be reviewed by the courts, and the presumption is that the commission acted reasonably and lawfully. It must clearly appear to the contrary before its orders can be set aside. *State ex rel. G. N. Ry. Co. v. Pub. Ser. Com. (Wash.)*, 142 Pac. 684; *St. L., I. M. & S. Ry. Co. v. Bellamy (Ark.)*, 169 S. W. 322; *Louisville & N. R. Co. v. U. S.*, 216 Fed. 672. The fact that additional expense is involved in stopping a through train is not controlling in determining the reasonableness of an order to stop such train. *Id.*

(b) Where there is no evidence at all to support the order of the Commission, the presumption of its reasonableness is overthrown. *State v. Fla. E. C. Ry. Co. (Fla.)*, 67 So. 906.

(c) *Byington v. Chi., R. I. & P. R. Co. (Neb.)*, 148 N. W. 520.

sion or any of the members thereof, duly certified under its seal, and filed as aforesaid as a part of the record, shall be considered by the court as the testimony in the case.

Section 24. If the court shall, upon the record find that the order appealed from is reasonable and in conformity with law, it shall enter a decree dismissing the appeal and affirming the order of the Commission. If the court shall, upon the record, find that the order appealed from is unreasonable or based upon incompetent evidence<sup>44</sup> materially affecting the determination or order of the Commission,<sup>45</sup> or is otherwise not in conformity with law, it may enter a final decree reversing the order of the Commission, or, in its discretion, it may remand the record to the commission, with directions to reconsider the matter and make such order as shall be reasonable and in conformity with law.<sup>46</sup> In case the said court shall reverse an order of the Commission dismissing a complaint, after an investigation and hearing thereon before the Commission, it shall remand the record and proceedings to the Commission, with directions to reinstate the complaint, proceed to another hearing and investigation, and make such order [\*1428] as shall be reasonable and in conformity with law. In making any final decree on any appeal the court shall have full power to dispose of all costs.

Section 25. No evidence shall be received at the hearing on any appeal; but if any party shall satisfy the court that evidence has been discovered since the hearing before the Commission that could not have been obtained for use at that hearing by the exercise of reasonable diligence and will materially affect the merits of the case, the court may, in its discretion, remand the record

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44. (a) Fla. E. C. R. Co. v. United States, 234 U. S. 167, 58 L. Ed. 1267.

(b) An order made by the Interstate Commerce Commission against a number of roads jointly must be supported by evidence which is sufficient to warrant a finding separately against each road named in the order. St. L., I. M. & S. Ry. Co. v. U. S., 217 Fed. 80.

45. (a) An administrative order made indisputably contrary to the evidence, or without any evidence, must be deemed to be arbitrary, and subject to be set aside. Louisville & N. R. Co. v. Finn, 235 U. S. 601, 59 L. Ed. —; Interstate C. C. v. Union P. R. Co., 222 U. S. 541, 547, 56 L. Ed. 308, 311.

(b) Louisville & N. R. Co. v. U. S., 216 Fed. 672, affirmed in U. S. Adv. Ops. 1914, 696, 59 L. Ed. —.

46. See Art. VI, Sec. 22, ante, and notes thereto.

and proceedings to the Commission, with directions to take such after-discovered evidence, and, after consideration thereof, enter and file such order as shall in the opinion of the Commission be reasonable and in conformity with law, from which order an appeal shall lie as in the case of any other final order.

Section 26. In all actions and proceedings in said court arising under this act process shall be served and the practice and rules of evidence shall be the same as in civil actions, except as otherwise herein provided.

Section 27. Every sheriff or other officer empowered to execute civil process shall execute any process issued under the provisions of this act, and shall receive such compensation therefor as may be prescribed by law for similar services.

Section 28. All appeals from the orders of the Commission to the said court shall take precedence upon the calendars of the said court over all other civil actions, except election cases and suits for wages.

Section 29. Nothing in this act contained shall be construed to deprive any party, upon any such appeal and judicial review of the proceedings and orders of the Commission, of the right to trial by jury of any issue of fact raised thereby or therein, where such right is secured either by the Constitution of the Commonwealth or of the United States, but in every such case such right of trial by jury shall remain inviolate: Provided, however, That when any appeal is taken, such right shall be deemed to be waived upon all issues, unless expressly reserved in such reasonable manner as shall be prescribed by the Superior Court.

Section 30. Any party to the record, aggrieved by the final judgment, order, or decree of the aforesaid *Superior Court, or of the court of the county, whenever under the provisions of this act an appeal may in the first instance be taken to said court*, may appeal therefrom to the Supreme Court. Such appeal shall be taken and prosecuted in the same manner and form, and with the same effect, as is provided in other cases of appeal to the Supreme Court, *from the courts of Common Pleas of the Commonwealth.*<sup>47</sup> [Italics from amendment of June 3, 1915.]

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47. The construction placed upon a state statute by the court of last resort in that state, is binding on the Federal courts. *Louisville & N. R. Co. v. Ky. R. R. Com.*, 214 Fed. 465; affirmed in *L. & N. R. Co. v. Finn*,

[\*1429] \*Section 31. No injunction shall issue modifying, suspending, staying, or annulling any order of the Commission, or of a commissioner, except upon notice to the Commission and after cause shown upon a hearing. The Court of Common Pleas of Dauphin County is hereby clothed with exclusive jurisdiction throughout the Commonwealth of all proceedings for such injunctions, subject to an appeal to the Supreme Court as aforesaid.<sup>48</sup> Whenever the Commission shall make any rule, regulation, finding, determination, or order under the provisions of this act the same shall be and remain conclusive upon all parties affected thereby, unless set aside, annulled, or modified in an appeal or proceeding taken as provided in this act.

Section 32. Every public service company, its officers, agents, and employees, affected by any final order of the Commission or any final order of the *Superior Court*, or of the Supreme Court, shall obey, observe, and comply with such order, and with the terms and conditions thereof, so long as the same shall be and remain in force.<sup>49</sup> [Italics from amendment of June 3, 1915.]

Section 33. Whenever the Commission shall be of opinion that any public service company is violating or is about to violate any provision of this act; or has done or is about to do any act, matter, or thing herein prohibited or declared to be unlawful; or has failed, omitted, neglected, or refused, or is about to fail, omit, neglect or refuse, to perform, any duty enjoined upon it by this act; or has failed, omitted, neglected, or refused or is about to fail, omit, neglect, or refuse, to obey any lawful requirement or final order made by the Commission; or any final judgment, order, or decree made by the *Superior Court*, or by the Supreme Court,—then, and in every such case, the Commission may, by its

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235 U. S. 601, 59 L. Ed. —; *Wadley Southern R. Co. v. Georgia*, 235 U. S. 651, 59 L. Ed. —.

48. Where an injunction restraining the enforcement of an order of a state commission is sought in a Federal court, the complainants must show an invasion of rights conferred or affirmed by the Constitution or laws of the United States. *Manufacturers' L. & H. Co. v. Ott*, 215 Fed. 940. Such injunction will not be granted on the strength of *ex parte* affidavits made to matters which might have been testified to before the commission but were not introduced. *Id.*

49. This section does not apply to municipalities. *Bethlehem City Water Co. v. Borough of Bethlehem*, 1 P. C. R. 227.



counsel or assistant counsel, institute in the name of the Commission, in the Court of Common Pleas of Dauphin County, injunction,<sup>50</sup> mandamus,<sup>51</sup> or other appropriate legal proceedings, to restrain such violations of the provisions of this act, or of the orders of the Commission, and to enforce obedience thereto; and the said Court of Common Pleas is hereby clothed with exclusive jurisdiction throughout the Commonwealth to hear and determine all such actions.<sup>52</sup> [Italics from amendment of June 3, 1915.]

Section 34. The attorney general, in addition to the exercise of the powers and duties now conferred upon him by law, shall also, upon request of the Commission, or of his own motion, proceed, in the name of the Commonwealth, by mandamus, injunction, or quo warranto, or other appropriate remedy at law or in equity, to restrain violations of the provisions of this [\*1430] \*act,<sup>53</sup> or of the orders of the Commission, or of the judgment, orders, or decrees of said court or to enforce obedience thereto.<sup>54</sup>

Section 35. If any public service company shall violate any of the provisions of this act, or shall do any matter or thing herein prohibited; or shall fail, omit, neglect, or refuse to perform any

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50. The court will not grant an injunction restraining a company from beginning business without the approval of the commission, where the petition is presented by a competing company. The remedy is by petition to the commission setting forth the proposed violation of the act and praying for action by the commission to restrain. *Baxter Tel. Co. v. Cherokee Co. Mutual Tel. Assn.* (Kan.), 146 Pac. 324.

51. Mandamus is the proper remedy to compel obedience to a proper order of a state commission. *Mich. R. R. Com. v. Detroit & M. Ry. Co.* (Mich.), 148 N. W. 385.

52. This section does not apply to municipalities. *Bethlehem City Water Co. v. Borough of Bethlehem*, 1 P. C. R. 227.

53. (a) See Art. VI, Sec. 33, ante, and notes thereto.

(b) The passage of a city ordinance requiring a water company to install meters at its own expense for the use of consumers, is not a "violation of this act" within the meaning of this section. *York Water Company v. City of York*, 2 P. C. R. 185. See *Same v. Same*, 28 York L. R. 193, and *City of York's Appeal* (in Supreme Court), 29 York L. R. 13.

54. An action to restrain a municipality from erecting its own water plant will not be brought by the Attorney General where such action on behalf of a corporation has been unsuccessfully carried to the Supreme Court of the United States. *Bondholders of Allegheny Valley Water Co. v. Borough of Tarentum*, 2 P. C. R. 518.

duty enjoined upon it by this act; or shall fail, omit, neglect, or refuse to obey, observe, and comply with any final direction, requirement, determination, or order made by the Commission; or to comply with any final judgment, order, or decree made by the *Superior Court* or the Supreme Court,—such public service company, for such violation, omission, failure, neglect, or refusal shall forfeit and pay to the Commonwealth of Pennsylvania the sum of fifty dollars;<sup>55</sup> to be recovered by an action of assumpsit, instituted in the name of the Commonwealth of Pennsylvania, in the court of Common Pleas of Dauphin County, which court is hereby clothed with exclusive jurisdiction throughout the Commonwealth to hear and determine all such actions. [Italics from amendment of June 3, 1915.]

In construing and enforcing the provisions of this section, the violation, omission, failure, neglect, or refusal of any officer, agent, or other person acting for or employed by any such public service company, acting within the scope of his employment, shall, in every case, be deemed to be the violation, omission, failure, neglect, or refusal of such public service company.<sup>56</sup>

Section 36. Each and every day's continuance in the violation of any final direction, requirement, determination, or order of the Commission, or of any final judgment, order, or decree made by the *Superior Court*, or by the Supreme Court, shall be a separate and distinct offense: Provided, however, That if any interlocutory order of supersedeas or a preliminary injunction be granted, no penalties shall be incurred or collected for or on account of any act, matter, or thing done in violation of such final direction, requirement, determination, or order, or decree, so superseded or enjoined, for the period of time such order or supersedeas or injunction is in force. [Italics from amendment of June 3, 1915.]

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55. (a) A penalty of \$22,400 for 224 violations of an order to stop a train at a certain depot, held not excessive. *Gulf, C. & S. F. Ry. Co. v. State (Tex.)*, 169 S. W. 385.

(b) As to the constitutionality of acts providing penalties for failure to obey an order of a state commission, see *Wadley Southern R. Co. v. Georgia*, 235 U. S. 651, 59 L. Ed. —, and cases there reviewed.

56. The unintentional act of an agent will not render the company liable to a penalty. *St. L., I. M. & S. Ry. Co. v. Baker (Ark.)*, 175 S. W. 397.

Section 37. Any president, secretary, treasurer, or other officer of any public service company, who shall knowingly affix his name or attestation to any certificate of stock, trust certificate, corporate bond, note, or other evidence of indebtedness, or other security issued by any public service company; or any director who shall knowingly assent to the issue of any such certificate of [\*1431] stock, trust certificate, corporate bond, note, \*or other evidence of indebtedness, or other security of any such public service company; in violation of any of the provisions or requirements of this act, or of section seven of article sixteen of the Constitution; or any officer or director knowingly making or assenting to any false statement in any certificate of notification required to be made to the Commission by subsections (b) or (c) of section four of article three of this act,—shall be guilty of a misdemeanor, and upon conviction thereof shall be sentenced to pay the costs of prosecution and a fine not exceeding five thousand dollars, or undergo an imprisonment in the county jail for a term not exceeding five years, either or both, in the discretion of the court.

Section 38. Each and every director, president, secretary, treasurer, or other officer, agent, or employee, of any public service company, who shall knowingly make or assent to any application or disposition of any stocks, trust certificates, bonds, notes, or other evidence of indebtedness or other securities, or the proceeds of the sale or pledge thereof, or any part thereof, in violation of any statement or contrary to any purpose in relation thereto set forth or contained in any certificate of notification; or who shall by any false statements, oral or written, knowingly make, procure, or seek to procure of the Commission the making or issuing of, any certificate herein provided; or who shall knowingly make or assent to any false statement in any report or account to the Commission as to the disposition or application of the proceeds, or any part thereof, of any sale or pledge of any stocks, trust certificates, bonds, notes, or other evidences of indebtedness or other securities,—shall be guilty of a misdemeanor, and upon conviction thereof shall be sentenced to pay the costs of prosecution and a fine not exceeding five thousand dollars, or undergo an imprisonment in the county jail for a term not exceeding five years, either or both, in the discretion of the court.

Section 39. Any person, whether an officer, agent, or employee of any public service company or not, or any corporation, who shall knowingly fail, omit, neglect, or refuse to obey, observe, and comply with any final order, direction, or requirement of the Commission, or with any final order or decree of the said *Superior Court*, or of the Supreme Court; or who shall knowingly procure, aid, or abet any such violation, omission, failure, neglect, or refusal,—shall be guilty of a misdemeanor, and upon conviction thereof in any Court of Quarter Sessions of competent jurisdiction shall be punished by a fine of not more than five hundred dollars, or by imprisonment in the county jail for not less than one month, [\*1432] nor more \*than twelve months, either or both, at the discretion of the court; and upon conviction of any subsequent offense shall be punished by a fine of not more than one thousand dollars, or by imprisonment in the county jail for not less than three months, nor more than eighteen months, either or both, at the discretion of the court. [*Italics from amendment of June 3, 1915.*]

Section 40. If any public service company shall do or cause to be done any act, matter, or thing prohibited or declared to be unlawful by this act, or shall refuse, neglect, or omit to do any act, matter, or thing enjoined or required to be done by this act, such public service company shall be liable to the person or corporation injured thereby in the full amount of damages sustained in consequence thereof: Provided, That the liability of public service companies for negligence, as heretofore established by statute or by common law, shall not be held or construed to be altered or repealed by any of the provisions of this act: And provided further, That the recovery in this section authorized shall in no manner affect a recovery by the Commonwealth of the penalty prescribed for the aforesaid violations of this act.

Section 41. No public service company, nor any officer, agent, or employee thereof, shall be liable for any penalty or forfeiture, or be subject to any prosecution, on account of demanding, collecting, or receiving any rate, fare, or charge for any service or product rendered or furnished by it, or for enforcing any rule, regulation, or practice, when such rate, fare, charge, rule, regulation, or practice is contained in the tariffs and schedules properly filed with the Commission, and posted or published as herein pro-

vided, and is applicable by the terms thereof at the time to the said service or product rendered or furnished, although such rate may be found by the Commission to be unjust, unreasonable, unjustly discriminatory or unduly preferential.

Section 42. All suits, remedies, prosecutions, penalties, and forfeitures provided for or accruing under this act shall be cumulative.

Section 43. All fines imposed and all penalties recovered under the provisions of this act shall be paid to the secretary of the Commission, and by him paid into the state treasury.

Section 44. No action for the recovery of any penalties or forfeitures incurred under the provisions of this act, and no prosecutions on account of any matter or thing concerned in this act, shall be maintained unless brought within three years from the date at which the liability therefor arose, except as otherwise herein provided.

Section 45. Nothing in this act shall be construed to impair the [\*1433] powers and duties of the Secretary of Internal Affairs, in the exercise of the general supervision over railroads, canals, and other transportation companies vested in him by the Constitution and laws of this Commonwealth; nor shall this act or any provision therein be construed to deprive the Department of Health of this Commonwealth or the Water Supply Commission of Pennsylvania of any jurisdiction, powers, or duties, now vested in them, or either of them, by the laws of this Commonwealth.

Section 46. Copies of all official documents filed or deposited according to law in the office of the Commission, certified by the secretary<sup>57</sup> under the seal of the Commission, shall be received in evidence in like manner and with the same effect as the originals; and a like certified copy of the testimony and proceedings, or any specific part thereof, shall be received in evidence in any court with the same effect as if the said secretary were present and testified to the facts set forth in his certificate.

Section 47. The Commission shall charge and collect the following fees for copies of all official orders, documents, papers, records, et cetera :

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57. A copy certified by the chairman, instead of by the secretary, is inadmissible. *Beaham v. N. Y. C. & H. R. R. Co.* (Mo.), 174 S. W. 150.

For copies of papers and records not required to be certified or otherwise authenticated by the Commission, ten cents for each folio of one hundred words.

For certified copies of official documents and orders filed in its office, fifteen cents for each folio of one hundred words, and one dollar for each certificate, under seal, affixed thereto.

For copies of testimony and proceedings taken or had before the Commission or a commissioner, not required to be certified or otherwise authenticated by the Commission, ten cents for each folio of one hundred words.

For certified copies of testimony and proceedings taken or had before the Commission or commissioner, fifteen cents for each folio of one hundred words, and one dollar for each certificate, under seal, affixed thereto.

For certifying a copy of any report made by any public service company to the Commission, two dollars.

For each certified copy of the annual report of the Commission, one dollar and fifty cents.

No fee shall be charged or collected for copies of papers, records, official documents, testimony, or proceedings furnished to public officers for use in their official capacity, nor for the annual report of the Commission in the ordinary course of distribution. All fees charged and collected by the Commission shall be paid into the state treasury.

Section 48. The Commission shall make an annual report, on or before the second Monday of May in each year, to the Governor [\*1434] nor; and a duplicate thereof shall be \*filed with the Secretary of Internal Affairs, which report shall contain:

First.—A record of its meetings and an abstract of its proceedings during the preceding year.

Second.—The results of any examinations or investigations made by it.

Third.—Such statements, facts, and explanations as will disclose the actual workings and operations of public service companies in their relation to the business and prosperity of the Commonwealth; and such suggestions as to the general policy of the Commonwealth, or the amendment of its laws in respect to said companies, or the condition, affairs or conduct of any public service company, as may seem to it appropriate.

Fourth.—Drafts of all bills suggested or recommended by it, and the reasons therefor.

Fifth.—Such tables and abstracts of the reports of public service companies as it may deem expedient.

Sixth.—A statement in detail of the traveling and other expenses and disbursements of the commissioners and their appointees and employees.

Five thousand copies of the report shall be printed and bound in cloth, as a public document of the Commonwealth, for the use of the commissioners, and to be distributed by them, in their discretion, to the officers of the public service companies and other persons interested therein.

Section 49. The provisions of this act, except when specifically so provided, shall not apply or be construed to apply to commerce with foreign nations or among the several states, except in so far as the same may be permitted under the provisions of the Constitution of the United States and the acts of Congress.<sup>58</sup>

Section 50. It is hereby declared that the provisions of this act are severable one from another, and severable as to the public service companies and subject-matters respectively dealt with thereby; and if for any reason one or more of such provisions be judicially held to be unconstitutional as applicable to any particular public service company or subject-matter dealt with by such provision, or be held unconstitutional in anywise for any reason, such holding or decision shall not affect the validity of such provision or provisions as applicable to other public service companies or subject-matters dealt with thereby, or the validity of the remaining provisions of this act. It is hereby declared that

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58. (a) No action for negligence in quoting freight rates on an interstate shipment can be sustained in a state court. *Sloop v. Delano* (Mo.), 170 S. W. 385.

(b) Shipment from one point to another in the same state, which, in reaching destination, passes into another state, is interstate commerce, and is beyond the jurisdiction of the state commission. *Wilson Bros. Lumber Co. v. P. S. & N. R. R. Co.*, 1909 Pa. R. Com. Rep. 105; *Tunnell & Co. v. P. R. R. et al.*, 1911 Pa. R. Com. Rep. 45; *Wichita Falls & W. Ry. Co. v. Asher* (Tex.), 171 S. W. 1114; *Holden v. Maine Cent. R. R. Co.* (N. H.), 92 Atl. 334.

(c) See Art. I, Sec. 1, ante.

the said provision, and the said remaining provisions, would have been enacted notwithstanding such judicial determination of the invalidity of any of said particular provision or provisions in any respect.

Section 51. The act, entitled "An act to provide for the appointment of a Railroad Commission; prescribing the membership [\*1435] of said commission, the manner \*and term of the appointment of its members; defining their powers and duties with reference to common carriers, and in relation to making recommendations to the Attorney General and Secretary of Internal Affairs concerning the regulation, control, and management of common carriers within the Commonwealth; defining what the term 'common carrier' shall include; providing for the appointment of subordinate officers and the employment of expert and clerical employees by said Commission; fixing the salaries of the members of said Commission and its subordinate officers; providing for the compensation of its employees; limiting the annual expense of said Commission; and making an appropriation for the payment thereof," approved the thirty-first day of May, Anno Domini one thousand nine hundred and seven (Pamphlet Laws, three hundred thirty-seven), be and the same is hereby, repealed; said repeal to take effect the first day of July, nineteen hundred and thirteen;<sup>59</sup> and sections one and two of the act, approved the fourth day of June one thousand eight hundred and eighty-three, entitled "An act to enforce the provisions of the seventeenth article of the Constitution relative to railroads and canals"; and the act, approved May twenty-fourth, one thousand nine hundred and seven, entitled "An act to provide the maximum car service charges, including car storage charges, that railroad companies and corporations, or associations, may charge and collect on each car loading, and not unloaded within the free time for unloading of cars, and fixing the free time that shall be allowed after unloading cars"; and the proviso of clause three, and the provisos of clause seven<sup>60</sup> of section thirty-four, of the act, entitled "An

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59. The powers of the Railroad Commission ceased July 1, 1913, the unfinished business of the Commission being transferred to the Public Service Commission. *Penna. Paraffine Works v. P. R. R. Co.*, 2 P. C. R. 513.

60. This clause, which gave the courts jurisdiction to determine the



act to provide for the incorporation and regulation of certain corporations," approved the twenty-ninth day of April, Anno Domini one thousand eight hundred and seventy-four (Pamphlet Laws, seventy-three); and all other acts or parts of acts, inconsistent herewith or supplied hereby, be, and the same are also hereby, repealed: Provided, That the repeal of sections one and two of said act of June four, one thousand eight hundred and eighty-three shall not affect actions for violation of said act of June four, one thousand eight hundred and eighty-three, instituted prior to the passage of this act.

Section 52. The Pennsylvania State Railroad Commission shall, on July first, nineteen hundred and thirteen, transfer and deliver to the Public Service Commission hereby created all property, books, maps, papers, files, records, pleadings in pending cases, reports, and other documents in its possession and belonging to it. The Public Service Commission is hereby authorized to take possession thereof.

Section 53. The act entitled "An act to promote the safety of [\*1436] travelers and employees upon railroads, by \*compelling common carriers by railroad to properly man their trains," approved the nineteenth day of June, Anno Domini one thousand nine hundred and eleven, shall remain in full force and effect, except that section nine thereof, which reads as follows: "Section nine. It shall be the duty of the State Railroad Commission of the Commonwealth to enforce the provisions of this act," shall be, and is hereby amended so as to read as follows: Section nine. It shall be the duty of the Public Service Commission of the Commonwealth of Pennsylvania to enforce the provisions of this act.<sup>61</sup>

Section 54. This act shall take effect the first day of January, Anno Domini one thousand nine hundred and fourteen,<sup>62</sup> and not

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reasonableness of water rates, is repealed, and that power is transferred to the Public Service Commission. *Borough of Bellevue v. Ohio Valley Water Co.*, 245 Pa. 114, 91 Atl. 236, affirming 1 P. C. R. 128.

61. The constitutionality of this act (Full Crew Law) was upheld in *Penna. R. R. Co. v. Ewing*, 241 Pa. 581.

62. For the purpose of disposing of the unfinished business of the former Commission, the Public Service Commission enjoyed its full powers from July 26, 1913. *Penna. Paraffine Works v. P. R. R. Co.*, 2 P. C. R. 513. But did not have these powers in regard to new complaints until Jan. 1, 1914. *Congdon v. Bell Tel. Co.*, 1 P. S. C. Rep. 212; *Reese v. Penna. Lighting Co.*, Id. 234.

before, except that it shall be lawful for the appointment of the commissioners to be made, and for the Commission to organize, and to appoint such officers and employees as hereinabove provided. The Commission shall be appointed, and shall organize and make such appointments and establish its offices as hereinabove provided, and make such general rules and orders under this act, effective when this act becomes effective, as it may deem wise and proper, on or before the first day of October, Anno Domini one thousand nine hundred and thirteen; from and after which latter date it shall be the duty of every public service company to file with the Commission, if required, and publish and post its tariffs or schedules and its rules and regulations affecting its contracts and classifications, as hereinabove provided: Provided, That the said Commission when appointed as aforesaid shall have power to hear and determine any pending cases transferred to it by The Pennsylvania State Railroad Commission, and to dispose of the unfinished business<sup>63</sup> of said State Railroad Commission: And provided, That section eleven of article three shall become effective upon the approval of this act. The salaries of the commissioners shall begin on July first, one thousand nine hundred and thirteen, or on such later date as they may respectively qualify as such commissioners; and the salaries and compensation of the officers and employees of the Commission shall begin when such officers and employees, respectively, are appointed or employed and enter upon the discharge of their duties.

Approved—The 26th day of July, A. D. 1913.

JOHN K. TENER.

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63. A complaint made to the Railroad Commission is "unfinished business" until the new rate prescribed in its order has been put into effect. *Penna. Paraffine Works v. P. R. R. Co.*, 2 P. C. R. 513. In disposing of this business the Public Service Commission is authorized to use, not the powers formerly exercised by the Railroad Commission, but larger powers conferred upon it by this Act. *Id.*

## PUBLIC SERVICE COMMISSION CITATIONS

January, 1914—June, 1915.

The following table shows what opinions of the Pennsylvania State Railroad Commission and of the Public Service Commission have been cited by the courts of Pennsylvania and by the Public Service Commission in later cases:

1911 Pa. R. Com. Rep. 37	2 P. C. R. 105
2 P. C. R. 532	2 P. C. R. 644
1 P. C. R. 49	2 P. C. R. 684
2 P. C. R. 600	2 P. C. R. 331
1 P. C. R. 122	2 P. C. R. 648
1 P. C. R. 231	2 P. C. R. 372
14 North. 214	2 P. C. R. 687
2 P. C. R. 686	2 P. C. R. 390
(141 Pacific Reporter 1091)	2 P. C. R. 718
2 P. C. R. 52	2 P. C. R. 403
2 P. C. R. 539	2 P. C. R. 647
2 P. C. R. 687	2 P. C. R. 483
2 P. C. R. 74	2 P. C. R. 647
2 P. C. R. 647	

## THE PUBLIC SERVICE COMPANY LAW CITED

The following table shows what Articles and Sections of The Public Service Company Law have been cited or construed by the courts of Pennsylvania and by the Public Service Commission:

### Citations of Act of July 26, 1913.

245 Pa. 114  
 247 Pa. 26  
 247 Pa. 240  
 1 P. C. R. 73  
 1 P. C. R. 125  
 1 P. C. R. 130  
 1 P. C. R. 138  
 1 P. C. R. 227  
 2 P. C. R. 57  
 2 P. C. R. 186  
 2 P. C. R. 406  
 2 P. C. R. 425  
 2 P. C. R. 515  
 2 P. C. R. 618  
 2 P. C. R. 647  
 2 P. C. R. 678  
 16 Dau. 265  
 17 Dau. 88  
 17 Dau. 226  
 17 Dau. 341  
 18 Dau. 112  
 18 Dau. 148  
 18 Dau. 249  
 18 Dau. 274  
 18 Dau. 316  
 1 P. S. C. Rep. 258  
 23 Dist. 139  
 62 P. L. J. 129  
 14 North. 210

### Citations of Particular Sections.

#### ART. I, Sec. 1.

##### "Public Service Company"

1 P. C. R. 229  
 2 P. C. R. 77  
 2 P. C. R. 333  
 14 North. 211  
 17 Dau. 180  
 18 Dau. 35

#### "Facilities"

1 P. C. R. 230  
 2 P. C. R. 692  
 14 North. 213  
 18 Dau. 377

#### ART. II, Sec. 1.

##### (a)

1 P. C. R. 153, 160, 170, 174  
 1 P. S. C. Rep. 463, 469, 477, 481

##### (c)

1 P. S. C. Rep. 437

##### (d)

1 P. C. R. 46  
 2 P. C. R. 99  
 1 P. S. C. Rep. 462  
 17 Dau. 199

##### (e)

2 P. C. R. 91  
 2 P. C. R. 637  
 1 P. S. C. Rep. 488  
 17 Dau. 163

##### (f)

1 P. C. R. 181  
 1 P. C. R. 127  
 2 P. C. R. 100  
 2 P. C. R. 287  
 1 P. S. C. Rep. 436  
 1 P. S. C. Rep. 459  
 17 Dau. 94  
 17 Dau. 78  
 17 Dau. 200  
 17 Dau. 363

##### (x)

1 P. C. R. 73  
 23 Dist. 139  
 16 Dau. 265

#### ART. III, Sec. 1.

##### (a)

2 P. C. R. 205  
 17 Dau. 307

- (b)  
 2 P. C. R. 205  
 2 P. C. R. 267  
 17 Dau. 307  
 18 Dau. 72
- (c)  
 2 P. C. R. 386  
 18 Dau. 94
- (d)  
 2 P. C. R. 387  
 18 Dau. 94
- Sec. 2.  
 (a)  
 2 P. C. R. 77  
 2 P. C. R. 424  
 17 Dau. 179  
 18 Dau. 147  
 141 Pac. Rep. 1088
- (b)  
 1 P. C. R. 125  
 2 P. C. R. 77  
 1 P. S. C. Rep. 258  
 17 Dau. 88  
 17 Dau. 179
- Sec. 3.  
 (b)  
 2 P. C. R. 335  
 18 Dau. 78
- (d)  
 247 Pa. 26  
 247 Pa. 241  
 1 P. C. R. 194  
 1 P. C. R. 229  
 2 P. C. R. 332  
 2 P. C. R. 520  
 1 P. S. C. Rep. 340  
 17 Dau. 98  
 18 Dau. 34  
 18 Dau. 254  
 14 North. 212
- Sec. 5.  
 2 P. C. R. 587  
 18 Dau. 241

## Sec. 7.

- 2 P. C. R. 99  
 17 Dau. 199

## Sec. 8.

- (a)  
 1 P. C. R. 225  
 1 P. C. R. 98, 99  
 1 P. C. R. 131  
 1 P. C. R. 215  
 2 P. C. R. 35  
 2 P. C. R. 99  
 2 P. C. R. 205  
 2 P. C. R. 267  
 1 P. S. C. Rep. 241  
 1 P. S. C. Rep. 487  
 17 Dau. 248  
 17 Dau. 68, 69  
 17 Dau. 139  
 17 Dau. 208  
 17 Dau. 199  
 17 Dau. 307  
 18 Dau. 72  
 62 P. L. J. 131

## (b)

- 1 P. C. R. 225  
 1 P. C. R. 131  
 2 P. C. R. 35  
 2 P. C. R. 267  
 1 P. S. C. Rep. 241  
 17 Dau. 208  
 17 Dau. 248  
 18 Dau. 72  
 62 P. L. J. 131

## Sec. 9.

- (a)  
 1 P. C. R. 99  
 2 P. C. R. 101  
 2 P. C. R. 722  
 1 P. S. C. Rep. 435  
 1 P. S. C. Rep. 487  
 17 Dau. 69  
 17 Dau. 200  
 18 Dau. 364

**Sec. 11.**

- 1 P. C. R. 125
- 2 P. C. R. 63
- 2 P. C. R. 415
- 2 P. C. R. 424
- 2 P. C. R. 592
- 2 P. C. R. 640
- 2 P. C. R. 645
- 2 P. C. R. 715
- 17 Dau. 88
- 17 Dau. 225
- 18 Dau. 307
- 18 Dau. 148
- 18 Dau. 246
- 18 Dau. 373
- 1 P. S. C. Rep. 258

**Sec. 12.**

- 2 P. C. R. 77
- 2 P. C. R. 424
- 17 Dau. 179
- 18 Dau. 147

**ART. IV.**

**ART. V, Sec. 1.**

- 1 P. C. R. 132
- 2 P. C. R. 638
- 62 P. L. J. 131

**Sec. 3.**

- 1 P. C. R. 132
- 2 P. C. R. 36
- 2 P. C. R. 722
- 17 Dau. 209
- 18 Dau. 364
- 62 P. L. J. 131

**Sec. 4.**

- 1 P. C. R. 127
- 2 P. C. R. 676
- 18 Dau. 314

**Sec. 5.**

- 1 P. C. R. 133, 136
- 2 P. C. R. 516
- 18 Dau. 249
- 62 P. L. J. 132, 133

**Sec. 7.**

- 2 P. C. R. 630

**Sec. 12.**

- 2 P. C. R. 71
- 2 P. C. R. 285
- 2 P. C. R. 587
- 2 P. C. R. 592
- 17 Dau. 194
- 18 Dau. 67
- 18 Dau. 241
- 18 Dau. 245
- 1 P. S. C. Rep. 332

**Sec. 13.**

- 2 P. C. R. 692
- 18 Dau. 377

**Sec. 18.**

- 247 Pa. 241
- 1 P. C. R. 231
- 2 P. C. R. 56
- 2 P. C. R. 63
- 2 P. C. R. 336
- 2 P. C. R. 389
- 2 P. C. R. 640
- 2 P. C. R. 645
- 2 P. C. R. 647
- 2 P. C. R. 685
- 2 P. C. R. 716
- 17 Dau. 219
- 17 Dau. 225
- 18 Dau. 78
- 18 Dau. 90
- 18 Dau. 373
- 14 North. 213

**Sec. 19.**

- 247 Pa. 241
- 2 P. C. R. 640

**Sec. 20.**

- 2 P. C. R. 36
- 17 Dau. 209

**Sec. 23.**

- 247 Pa. 241

**Sec. 26.**

- 2 P. C. R. 638

**Sec. 29.**

- 247 Pa. 241
- 1 P. C. R. 229
- 14 North. 211

**ART. VI, Sec. 1.**

2 P. C. R. 290

17 Dau. 362

**Sec. 6.**

2 P. C. R. 427

17 Luz. L. R. 414

**Sec. 9.**

2 P. C. R. 427

17 Luz. L. R. 414

**Sec. 13.**

2 P. C. R. 289

17 Dau. 361

**Sec. 14.**

2 P. C. R. 289

17 Dau. 361

**Sec. 17.**

2 P. C. R. 289

17 Dau. 361

**Sec. 24.**

2 P. C. R. 646

**Sec. 30.**

2 P. C. R. 428

17 Luz. L. R. 415

**Sec. 31.**

1 P. C. R. 133

62 P. L. J. 131

**Sec. 33.**

1 P. C. R. 127

2 P. C. R. 521

18 Dau. 255

**Sec. 34.**

1 P. C. R. 127

2 P. C. R. 521

18 Dau. 255

**Sec. 35.**

1 P. C. R. 127

**Sec. 36.**

1 P. C. R. 127

**Sec. 51.**

245 Pa. 114

2 P. C. R. 515

18 Dau. 248

**Sec. 54.**

2 P. C. R. 516

18 Dau. 249

## SUBJECT INDEX

### CONSTITUTION OF PENNSYLVANIA.

Art. XVI, Sec. 5. Registration of Foreign Corporations, . . .	361, 570
Art. XVI, Sec. 6. Powers of Corporations, . . . . .	540
Art. XVII, Secs. 1 and 3. Common Carriers, . . . . .	224
Art. XVII, Sec. 5. Powers of Corporations, . . . . .	540

### CONSTITUTION OF THE UNITED STATES

Art. IV, Sec. 2. Rights of Citizens, . . . . .	303
--	-----

### ACTS OF ASSEMBLY CONSTRUED

1848, Jan. 26, Regulating Turnpike, etc., Co.'s, . . . . .	194
1858, May 28, Regulating Rate of Interest, . . . . .	340
1874, April 22, Registration of Foreign Corporations, . . . . .	570
1874, April 29, Formation of Corporations, etc., . . . . .	182
Sec. 5. Corporate Elections, . . . . .	349
Secs. 14, 15. Wage Claims, . . . . .	353, 355
1876, May 1, Insurance Company, . . . . .	145
1878, May 23, Banking Corporations, . . . . .	340
1885, June 30, Taxation of Corporations, . . . . .	128, 543
1887, May 25, Practice, . . . . .	353
1889, June 1, Taxation, . . . . .	559, 651
1893, April 6, Incorporation of Secret Fraternal Beneficial So-	
cieties, . . . . .	291
1893, May 18, Co-operative Banking Associations, . . . . .	340
1893, June 8, Tax on Capital Stock, . . . . .	168, 429, 432, 437
1899, May 3, Bonus on Charters, . . . . .	141, 171
1901, Feb. 9, Bonus on Charters, . . . . .	141
1901, May 8, Bonus on Charters, . . . . .	651
1901, July 2, Ownership of Stock by a Corporation, . . . . .	540
1911, June 1, Dissolution of Insolvent Insurance Companies, . .	145, 568
1911, June 1, Taxation of Corporations, . . . . .	734
1911, June 7, Tax on Capital Stock, . . . . .	432, 437
1911, June 8, Registration of Foreign Corporations, . . . . .	357, 361, 439, 570, 651

1913, June 27, Governing Third Class Cities, . . . . .	639
--	-----

1913, June 27, Tax on Anthracite Coal, . . . . .	656
--	-----

1913, July 26, See Appendix—The Public Service Company Law  
—Annotated.

ACCOUNTS. Records—Failure to Keep. *Mehard v. New Wilmington W. S. Co.*, 272.

ADMINISTRATIVE RULINGS of Public Service Commission. See  
Table of Cases in Front.



**AFFIDAVIT.** See **PRACTICE.**

**AFFIDAVIT OF DEFENSE.** Assessment by mutual insurance company—Fraud. *Tanner, Receiver v. Weber Co.*, 167.

Failure to deny material averments. *Donaldson, Receiver v. Boyer*, 165.

Stock subscription contract—Action by receiver—Fraud. *Donaldson, Receiver v. Rabenhold*, 145; *Same v. Rollman*, 155; *Same v. Mabry*, 159; *Same v. Boyer*, 165; *Same v. Body*, 162.

**APPEALS.** From Public Service Commission—Time for filing—Notice of finding and determination. *Consumers' Elec. Co., etc. Appellant v. Pub. Ser. Com. et al.*, 288.

**APPORTIONMENT.** Cost of Viaduct. *Borough of Butler's Petition*, 65, 178; *City of Wilkes-Barre v. L. V. R. R. Co.*, 278; *Application of Wilkes-Barre C. R. Co.*, 470.

Joint Rates. *Pittsburgh Steel Co. v. P. & L. E. R. R. Co. et al.*, 86.

**APPROVAL.** Contracts for Abolition of Crossings. *Application of Supervisors of Concord Twp.*, 590.

Crossings at grade—Necessity—Evidence. *Petition of Cornwall & Lebanon R. Co.*, 388.

Crossings—Construction of. *In re Grade Crossings, etc.*, 593.

Crossing of facilities. *Slate Belt Tel. & Tel. Co. v. Blue Mt. Tel. & Tel. Co.*, 403.

Crossings—Public Safety—Necessity. *Application of Gaffney & James City R. R. Co.*, 112.

Crossings—Viaduct. *City of Wilkes-Barre v. L. V. R. R. Co.*, 278.

Erection of viaduct—Apportionment of cost. *Borough of Butler's Petition*, 65, 178.

Extensions—Trolley companies—Public necessity—Discretion of Commission. *Application of Reading, B. & P. R. R. Co.*, 536.

Foreign corporation—Trackless trolley—Purposes not authorized by our laws. *Perkiomen Elec. Co.'s Petition*, 334.

Incorporation—Competition. *Application of Potato Creek Gas Co.*, 491; *Penna. Utilities Co. v. Lehigh Nav. Elec. Co.*, 74.

Merger—Public convenience. *Application of E. Penn Gas Light Co.*, 688.

Municipal contracts—Competition between natural and artificial gas companies. *Application of Peoples' Nat. Gas Co.*, 620.

Competition in small community. *Petition of Twp. of Jenkins*, 680.

Competition—Rates—Service. *Borough of Avoca's Petition*, 372.

Competition—Refusal of company enjoying present contract to enter bid. *Borough of Exeter's Petition*, 60.

Competition—Satisfactory service by company now operating. *Petitions of E. End Elec. L. H. & P. Co. et al.*, 714; *Application of Harmony Elec. Co.*, 42.

- Competition—Unsatisfactory service—Remedy. Borough of Exeter's Petition, 52.
- Competitive bidding—Illegal contract. Petition of City of Williamsport, 639.
- Crossings—Necessity. Petition of Phoenixville, V. & S. E. Ry. Co., 191.
- Ordinance passed prior to July 26, 1913—Bona fide investment—Competition. Slate Belt Tel. & Tel. Co. v. Blue Mt. Tel. & Tel. Co., 403; Application of Raystown Water Power Co., 483.
- What is a "contract"—Crossings—Competition. Petition of Lehigh Nav. Elec. Co., 413.
- Municipalities—Erection of municipal light plant—Jurisdiction. Borough of Gettysburg's Petition, 331.
- Municipalities—Water plant—Construction of—Protest. Borough of Gallitzin's Application, 369.
- Municipalities—Water plant begun prior to July 26, 1913—Power of the Commission. Bondholders of Allegheny Valley Water Co. v. Tarentum, 518.
- ARTICLES OF ASSOCIATION. See CHARTER.
- ATTACHMENT. Service on Foreign Corporation. Panarello v. Patterson, M. & L. Co., 238.
- BANKING ASSOCIATIONS. Usury—Recording of Articles. In re co-operative Banking Associations, 340.
- BENEFICIAL ASSOCIATIONS. Factional dispute—Minority control—Forfeiture of membership. Society of St. Michael, etc. v. Belinski, 294.
- Incorporation of—Purposes—Jurisdiction of court. In re Incorporation of Federal Life Association, 291.
- BONUS. Foreign Corporations—Money on deposit—Bills receivable. Com. v. Imperial Window Glass Co., 493.
- Foreign corporations—What is capital employed in this state. Com. v. W. Penn Steel Co., 557.
- Increase of capital stock. Com. v. Torrance Land Co., 141.
- Com. v. American Lime & Stone Co., 503.
- Increase of capital stock—Special charter exempting company from payment of. Com. v. Pittsburgh Fire Ins. Co., 171.
- BY-LAWS. Reasonableness of—Rights of citizens of other states. Jefferis v. Pittsburgh Live Stock Exchange, 303.
- Quorum—Annual election—Rights of majority and minority. Lutz v. Webster, 349.
- CANCELLATION OF JOINT RATES. Justification of. Pittsburgh Steel Co. v. P. & L. E. Co., et al., 86.
- CAPITAL STOCK. See also BONUS, TAXATION, STOCK.
- CEMETERY CORPORATION. Incorporation of—Whether 1st or 2d class. Sunnyside Cemetery Association's Charter, 510.

- CERTIFICATE OF PUBLIC CONVENIENCE.** Approval of crossings  
 —Construction of others than those approved. *Citizen's Elec. Ill. Co. v. Consumer's Elec. Co.*, 384.  
 Deviation from terms of—Injunction to restrain. *Citizen's Elec. Ill. Co. v. Consumer's Elec. Co.*, 426.
- CHARTER.** See also **INCORPORATION.**  
 Amendment of articles by Public Service Commission. Application of Potato Creek Gas Co., 491.  
 Application for—Ground for refusal—Confusion of name—Withdrawal of signer. In re Application, etc., 744.  
 Application for—Similarity of name. In re State Haymakers Association of Pennsylvania, 566.  
 Collateral attack—Pleading. *Nat. Freight Bureau v. Deppen Brewing Co.*, 218.  
 Powers—Refusal of public service company to exercise. *Grubb v. Bangor Elec. L. H. & P. Co.*, 175; *Brandt v. Leas*, 419.  
 Purpose—Approval of Public Service Commission. *Perkiomen Elec. Co.'s Petition*, 334.  
 Purposes—Statement of—Insurance companies—Jurisdiction of court. In re Incorporation, etc., 291.  
 Recording of. In re co-operative Banking Associations, 340.  
 Special charter—Construction of. *Com. v. Pottsville Water Co.*, 500.  
 Special charter exempting company from payment of bonus on increase of capital stock. *Com. v. Pittsburgh Fire Ins. Co.*, 171.
- CITIZENS.** Rights—By-laws of corporations. *Jefferis v. Pittsburgh Live Stock Exchange*, 303.
- CLASSIFICATION.** Commodities—Purpose for which used—Status of consumer. *Birdsboro Stone Co. v. P. & R. Ry. Co.*, 264.  
 Commodities—Pulp wood. *West Va. Pulp & Paper Co. v. P. R. R. Co.*, 673.  
 Of patrons—Reasonableness—Discrimination. *Thompson & Hanna Co. v. Erie Co. Elec. Co.*, 199; *Meter v. Metropolitan Elec. Co.*, 117.  
 Traffic of Inclined Plane Co. *Geer v. Cambria I. P. Co.*, 455.
- COMMON CARRIERS.** Industrial railroads—Interstate Commerce Act—Filing tariffs and schedules. *Crane R. R. Co. v. Central R. R. Co. of N. J.*, 224.
- COMPETITION.** See **APPROVAL** (Municipal contracts—Competition).  
 Effect upon rates. *Borough of Lewistown v. Penn Central L. & P. Co.*, 249.  
 Regulation of—Jurisdiction of the Commission—Rights acquired prior to July 26, 1913. *Penna. Utilities Co. v. Lehigh Nav. Elec. Co.*, 422.
- COMMUTATION TICKETS.** In re sale of, on or prior to the date of the initial trip. Administrative Ruling No. 7, 650.
- CONFERENCE RULINGS.** See Table of Cases in front.
- CONSTITUTIONAL LAW.** Title of act—Local or special legislation—  
 Double taxation—Due process of law. *Com. v. Alden Coal Co.*, 656.

**CONTRACTS.** See **APPROVAL OF.**

**CONTRACTS.** Between companies and municipalities—"Lowest responsible bidder"—Discretion of municipal officers. *City of Pittston's Petition*, 105.

Damages for breach—Loss of value of stock. *White v. First Nat. Bank of Pittsburgh*, 748.

Perpetual contract between borough and water company fixing rates. *Borough of Mt. Union v. Mt. Union Water Co.*, 698.

**CONTRACTORS.** Free transportation of. *Administrative Ruling No. 3*, 99.

**CORPORATE LOANS.** Taxation of—Foreign corporation—"Doing business"—*Com. v. The Tonopah & Goldfield R. R. Co.*, 128.

**COUPONS.** Action to recover on—Presumption of payment. *McDowell v. Northside Bridge Co.*, 216.

**CORPORATIONS.** Bonds—Coupons—Action to recover on. *McDowell v. Northside Bridge Co.*, 216.

Directors—Power to close business—Redemption of preferred stock. *Wetherill v. Arasapha Manufacturing Co.*, 579.

Directors—Resolution of board—Parol evidence to explain. *Barnd v. First Nat. Bank*, 222.

Dissolution—Rights of stockholders—Distribution. *Com. v. Guardian Fire Ins. Co.*, 365.

Dissolution—Purchase of entire stock by one person. *Nat. Freight Bureau v. Deppen Brewing Co.*, 218.

Mis-appropriation of funds by officer—Suit to recover from payee. *Schmitt, Receiver v. Potter, Title & Trust Co.*, 755.

Not for profit—By-laws—Reasonableness of. *Jefferis v. Pittsburgh Live Stock Exchange*, 303.

Not for profit—Rights of majority and minority—Place of business—Change of name—Injunction. *Hiester v. Gougliersville Band*, 298.

Right to use of name—Injunction. *Goodyear Raincoat Co. v. Broudy*, 212.

Sale of stock—Special agreement favoring certain stockholders—Ultra vires contract. *Mamaux v. Union Casualty Ins. Co.*, 344.

Wage claims against stockholders—Pleadings—Sufficiency of statement. *Blair, etc. v. Kingston Manufacturing Co.*, 353, 355.

Wage claims—Preference—Distribution. *Jerymn v. Barium Products Co.*, 511.

**CROSSINGS.** See **APPROVAL OF.**

Approval of—Public necessity. *Petition of Phoenixville, V. & S. E. Ry. Co.*, 191.

Approval of construction of—Damages to adjacent property. *In re grade crossings, etc.*, 593.

Damages—Jurisdiction of Commission. *In re Grade Crossings, etc.*, 586.

- Grade crossings—Necessity—Evidence. *Petition of Cornwall & Lebanon R. Co.*, 388.
- Ordinance permitting—Approval of. *Petition of Lehigh Nav. Elec. Co.*, 413.
- Railroad tracks—Approval of—Necessity for. *Application of Gaffney & James City R. R. Co.*, 112.
- Viaduct—Apportionment of cost. See Apportionment.
- CROSSINGS OF FACILITIES. Approval of. *Slate Belt Tel. & Tel. Co. v. Blue Mt. Tel. & Tel. Co.*, 403.
- Failure to secure approval of. *Citizen's Elec. Ill. Co. v. Consumer's Elec. Co.*, 384.
- General Order No. 11, 102.
- DAMAGES. Abolition of crossings—Jurisdiction of Commission. In re *Grade Crossings, etc.*, 586, 593; In re *Abolition of Grade Crossing*, 730.
- DEMURRAGE. Interplant movement—Scope of general demurrage rules. *Crucible Steel Co. of A. v. P. R. R. Co.*, 599.
- Private cars on private sidings. *Pittsburgh Plate Glass Co. v. P. R. R. Co.*, 530, 605.
- DIRECTORS. See CORPORATIONS.
- DISCOUNTS. See also PAYMENT.
- Allowance of, after expiration of discount period, 127.
- DISCRIMINATION. Between localities—Freight rates—Comparison of. *City of Phila. et al. v. P. & R. Ry. Co. et al.*, 313.
- Between localities—Train service. *Fiscus v. P. & R. Ry. Co.*, 252.
- Between localities—Competition. *Borough of Lewistown v. Penn Central L. & P. Co.*, 249.
- Classification of commodities—Purpose for which used—Crushed stone—"Substantially similar circumstances and conditions." *Birdsboro Stone Co. v. P. & R. Ry. Co.*, 264.
- Classification of patrons—Comparison of rates. *Thompson & Hanna Co. v. Erie Co. Elec. Co.*, 199.
- Deviation from published tariffs. *Good Shepherd Home v. Lehigh Valley L. & P. Co.*, 187.
- Interplant movements—Demurrage. *Crucible Steel Co. of A. v. P. R. R. Co.*, 599.
- Rates—Attempt by carrier to regulate competition—Reparation. *Adrian Furnace Co. v. P. R. R. Co.*, 632.
- Rates—Classification of commutation tickets. *Combined Committee, etc. v. P. R. R. Co.*, 390.
- Rates—Effect of filing of tariffs. *Crane R. R. Co. v. C. R. R. Co. of N. J.*, 224.
- Rates on street railway—Local conditions. *Sassaman v. Lehigh Valley Transit Co.*, 80.
- Rates—Reasonableness of—Coal hauled in producer's cars—Valuation of property. *Penna. Rubber Co. et al. v. P. R. R. Co.*, 31.

- Rates—Service—Telephone companies. *Lehigh Valley Coal Co. v. Bell Tel. Co.*, 441.
- Service—Station facilities. *Blough v. B. & O. R. R. Co.*, 84.
- Street Railways—Transfers. *27th Ward Prog. Club v. Pittsburgh Rlys. Co.*, 585.
- "DOING BUSINESS." See FOREIGN CORPORATIONS.
- ELECTIONS. By-laws—Quorum—Powers of minority. *Lutz v. Webster*, 349.
- ELECTRIC COMPANIES. Classification of patrons—Discrimination—Comparison of rates. *Thompson & Hanna Co. v. Erie Co. Elec. Co.*, 199.
- Extension of facilities—Necessity. *Bixler v. United Elec. Co. of Lemoyne*, 609.
- Regulation requiring payment in advance—Minimum rate—Reasonableness of. *Cauffiel v. Citizens L. H. & P. Co.*, 189.
- Service—Reasonable rules—Installation of meters. *Meter v. Metropolitan Elec. Co.*, 117.
- EVIDENCE. Claim of exemption from capital stock tax—Affidavit of treasurer. *Com. v. John B. Stetson Co.*, 240; *Com. v. Standard Underground Cable Co.*, 243.
- Crossings—Public necessity. *Petition of Cornwall & L. R. Co.*, 388.
- Demand for additional train service. *Fiscus v. P. & R. Ry. Co.*, 252.
- Increase in rates on one branch of service. *Elliott v. Big Spring Elec. Co.*, 709.
- Parol evidence to explain—Resolution of board of directors. *Barnd v. First Nat. Bank*, 222.
- Rates—Comparison of. *Combined Committee, etc. v. P. R. R. Co.*, 717.
- Rates—Comparison of—Discrimination between localities. *City of Phila. et al. v. P. & R. Ry. Co. et al.*, 313.
- Rates—Comparison of—Valuation of property. *Curry v. Emlenton Water Co.*, 613.
- See also RATES, COMPARISON OF.
- EXEMPTION. See also TAXATION.
- Exemption of capital stock of manufacturing companies from taxation. *Com. v. Ind. Ref. Co. Ltd.*, 168; *Com. v. John B. Stetson Co.*, 240; *Com. v. Standard Underground Cable Co.*, 243.
- EXTENSIONS. Electric light companies—Necessity. *Bixler v. United Elec. Co. of Lemoyne*, 609.
- Street railway companies—Power of Commission to compel. *Scranton v. Scranton Rys. Co.*, 689.
- Trolley companies—Approval of—Public necessity. *Application of Reading, B. & P. R. R. Co.*, 536.
- FACILITIES. See also SERVICE.
- Crossing of—Approval of. *Slate Belt Tel. & Tel. Co. v. Blue Mt. Tel. & Tel. Co.*, 403.

- Crossing of—Failure to secure approval. *Citizen's Elec. Ill. Co. v. Consumer's Elec. Co.*, 384.  
Regulation of crossing of. General Order No. 11, 102.  
Maintenance of turnpike. *Zook v. W. K. T. Road Co.*, 194.  
Stations—Accommodation of public. *Callahan v. Erie R. R. Co.*, 257;  
*Keefer v. P. R. R. Co.*, 452.  
FILING. Finding and determination—Appeal from Public Service Commission. *Consumer's Elec. Co. etc., Appellant v. Pub. Ser. Com. et al.*, 288.  
FOREIGN CORPORATIONS. Bonus—Money on deposit—Bills receivable. *Com. v. Imperial Window Glass Co.*, 493.  
Bonus—What is capital employed in the state. *Com. v. W. Penn Steel Co.*, 557.  
Conditions precedent to doing business—Registration—"Doing business." *Locomobile Co. of A. v. Malone*, 651.  
Public service company—Trackless trolley—Purpose not authorized by Pa. laws. *Perkiomen Elec. T. Co.'s Petition*, 334.  
Registration—"Doing business"—Interstate Commerce. *Milwaukee Western Malt Co. v. Mellet*, 357.  
Registration—Right to sue—Pleadings. *Bank of Hamilton v. Trescher*, 361.  
Registration—Service of process. *Locomobile Co. of A. v. Malone*, 439. *Woelpper v. Wilkes-Barre & Hazleton R. R. Co.*, 761.  
Registration—Sufficiency of statement. *Locomobile Co. of A. v. Malone*, 570.  
Service of attachment—"Doing business." *Panarello v. Patterson, M. & L. Co.*, 238.  
Tax on corporate loans—"Doing business in this Commonwealth"—Non-resident treasurer. *Com. v. Tonopah & Goldfield R. R. Co.*, 128.  
Taxation—Loans—"Doing business"—Holding companies. *Com. v. Wilkes-Barre & Hazleton R. R. Co.*, 543.  
FRANCHISES. Duty to exercise—Railroad companies. *Brandt v. Leas*, 419.  
Refusal to exercise—Duty of two companies to co-operate in service to the public. *Grubb v. Bangor Elec. L. H. & P. Co.*, 175.  
FRAUD. Assessment by mutual insurance company—Affidavit of defense. *Tanner, Receiver v. Weber Co.*, 167.  
Stock subscription contract—Failure to begin business—Action by receiver—Affidavit of defense. *Donaldson, Receiver v. Rabenhold*, 145; *Same v. Rollman*, 155.  
GRADE CROSSINGS. See CROSSINGS.  
GENERAL ORDERS. See Table of Cases in front.  
HOLDING COMPANIES. "Doing business"—Taxation. *Com. v. Wilkes-Barre & Hazleton R. R. Co.*, 543.

- INCLINED PLANE COMPANIES.** Classification of traffic—Rates. *Geer v. Cambria I. P. Co.*, 455.
- INCORPORATION.** Approval of—Charter issued prior to July 26, 1913. *Penna. Utilities Co. v. Lehigh Nav. Elec. Co.*, 74.  
Approval of—Amendment of articles by Public Service Commission. Application of *Potato Creek Gas Co.*, 491.  
Cemetery companies—Whether 1st or 2d class. *Sunnyside Cemetery Association's Charter*, 510.  
Charter—Statement of purpose of—Insurance companies—Jurisdiction of court. In re *Incorporation, etc.*, 291.  
Water companies—Territory. In re *Incorporation of water company*, 182.
- INDUSTRIAL RAILROADS.** See **COMMON CARRIERS.**
- INJUNCTION.** To restrain foreclosure of corporate mortgage. *Sickles v. Wyoming Trust Co.*, 132.  
Change of name and place of corporate business. *Hiester v. Gougler'sville Band*, 298.  
Construction of crossing contrary to terms of certificate of public convenience. *Citizen's Elec. Ill. Co. v. Consumer's Elec. Co.*, 426.  
Erection of municipal water plant—Jurisdiction of Commission. *Bondholders of Allegheny Valley Water Co. v. Tarentum*, 518.  
Use of corporate name. *Goodyear Raincoat Co. v. Broudy*, 212.
- INSURANCE COMMISSIONER.** Dissolution of insolvent insurance company—Liquidation of claims. *Havilak v. Am. Union Fire Ins. Co.*, 568.
- INSURANCE COMPANIES.** Incorporation of—Jurisdiction of courts. In re *Incorporation, etc.*, 291.  
Mutual company—Assessments—Fraud—Affidavit of defense. *Tanner, Receiver v. Weber Co.*, 167.  
Rights of stockholders—Dissolution—Distribution. *Com. v. Guardian Fire Ins. Co.*, 365.  
Service on—Domicile. *Lamm, et al. v. Pension Mutual L. Ins. Co.*, 139.  
Tax on gross premiums—Deduction of annual dividends. *Com. v. Penn Mut. Life Ins. Co.*, 359; *Com. v. Metropolitan Life Ins. Co.*, 734.
- INTERSTATE COMMERCE.** Industrial railroads—Filing of tariffs—Discrimination in rates. *Crane R. R. Co. v. C. R. R. of N. J.*, 224.
- INVESTMENT.** See **RETURN ON INVESTMENT.**
- JOINT RATES.** See **APPORTIONMENT, CANCELLATION.**  
Cement—Adjustment between localities. *Dexter Portland Cement Co. v. L. V. R. R. Co.*, 447.  
Discrimination—Attempt of carrier to regulate competition. *Adrian Furnace Co. v. P. R. R. Co.*, 632.  
Through routes. *Lehigh Fire Brick Works v. P. R. R. Co.*, 625.



- JURISDICTION.** Corporations—Service of process. *Schildt v. Valley Rys. Co.*, 740.
- Insolvent insurance companies—Liquidation of claims. *Havilak v. Am. Union Fire Ins. Co.*, 568.
- Public Service Commission. Approval of municipal water plant. In re Approval, etc., 104.
- Crossings—Damages. In re Grade Crossings, etc., 586.
- Determination of legality of municipal contract prior to approval. Petition of City of Williamsport, 639.
- Injunction to restrain construction of crossing—Deviation from terms of certificate of public convenience. *Citizen's Elec. Ill. Co. v. Consumer's Elec. Co.*, 426.
- Injunction to restrain enforcement of city ordinance. *York Water Co. v. City of York*, 185.
- Merger of railroads outside the Commonwealth. *New York Central Merger*, 377.
- Powers of company under charter. *Borough of Avoca's Petition*, 372.
- Rights acquired prior to July 26, 1913. *Penna. Utilities Co. v. Lehigh Nav. Elec. Co.*, 422.
- Unfinished business of Railroad Commission. *Pennsylvania Paraffine Works v. P. R. R. Co.*, 513.
- MANUFACTURING COMPANIES.** See **TAXATION.**
- Exemption from tax on capital stock—Cold storage company. *Com. v. Industrial Cold Storage & W. Co.*, 429.
- Capital invested in securities of other corporations. *Com. v. Westinghouse Air-brake Co.*, 548.
- Capital invested in tank cars. *Com. v. Ind. Refining Co.*, 168.
- Making railroad ballast. *Com. v. Bellefonte Lime Co.*, 437.
- Manufacturing done by another company under contract. *Com. v. Williamsport Rail Co.*, 497.
- Quarrying and crushing stone. *Com. v. John T. Dyer Quarry Co.*, 432.
- Working capital. *Com. v. John B. Stetson Co.*, 240; *Com. v. Standard Underground Cable Co.*, 243.
- MERGER.** See **APPROVAL.** Continuous lines of railroad—Parallel and competing lines. *New York Central Merger*, 377.
- Rights of dissenting stockholders—Laches—Dissolution—Distribution. *Com. v. Guardian Fire Ins. Co.*, 365.
- METERS.** Power of municipality to compel companies to furnish. *York Water Co. v. City of York*, 185.
- Water companies—Rules and regulations. *Lare v. Penna. Water Co.*, 733.
- MORTGAGES.** Foreclosure of—Stockholder's bill to restrain. *Sickles v. Wyoming Valley Trust Co.*, 132.
- MUNICIPAL CONTRACTS.** See **APPROVAL, CONTRACTS.**

**MUNICIPALITIES.** See **APPROVAL, CONTRACTS.**

Erection of water plant—Approval—Jurisdiction. In re Approval, etc., 104.

Officers—Discretion in awarding contracts. City of Pittston's Petition, 105.

Officers—Free transportation of. In re Free Transportation, etc., 126.

Ordinance requiring water company to supply meters—Validity—Jurisdiction of Public Service Commission. York Water Co. v. City of York, 185.

**NAME.** Change of corporate name—Bill to restrain. Hiester v. Gougliersville Band, 298.

Similarity of—Confusion—Injunction. Goodyear Raincoat Co. v. Broudy, 212.

Similarity of—Right of unincorporated society to oppose—Application for charter. In re Application, etc., 744.

Similarity of—Application for charter. In re State Haymakers' Assn. of Pa., 566.

**PASSES.** Charitable organizations. Administrative Ruling No. 4, 100.

Municipal officers. In re Free Transportation, etc., 126.

Railroad contractors, materials, etc. Administrative Ruling No. 3, 99.

**PAYMENT.** Discounts and penalties. Administrative Ruling No. 6, 386.

Presumption of—Action to recover on coupons. McDowell v. Northside Bridge Co., 216.

Rule requiring deposit in advance—Reasonableness of. Cauffiel v. Citizens' L. H. & P. Co., 189.

**PENALTIES.** For non-payment of bills. Administrative Ruling No. 6, 386.

**PLEADING.** Proof of corporate existence—Collateral attack. Nat'l Freight Bureau v. Deppen Bwg. Co., 218.

Sufficiency of statement—Unregistered foreign corporation—Plea in abatement. Bank of Hamilton v. Trescher, 361.

Sufficiency of statement—Wage claim against stockholders. Blair, etc. v. Kingston Mfg. Co., 353.

Sufficiency of statement—Foreign corporation—Registration. Locomobile Co. of A. v. Malone, 570.

**PRACTICE.** See also **AFFIDAVIT OF DEFENSE.**

Equity—Motion to dismiss bill. Wetherill v. Arasapha Mfg. Co., 579.

Public Service Commission—Form of complaint—Affidavit. Stouffer v. Chambersburg, G. & W. St. Ry. Co., 89.

Rehearing—Modification of orders. Combined Committee, etc. v. P. R. R. Co., 717; In re Application, etc., 728.

Rules of Practice, 1-31.

Time for filing appeal from Public Service Commission—Notice of filing of finding and determination. Consumers' Elec. Co., etc., Appt. v. Public Service Commission, et al., 288.

- PRIVATE CARS.** Rates—Reasonableness of. *Penna. Rubber Co. v. P. R. R. Co.*, 31.
- PROCEDURE.** See **PRACTICE.**
- PUBLICATION** of Commission's Rulings, etc., by public service companies. General Order No. 12, 339.
- PUBLIC SERVICE COMMISSION.** See **JURISDICTION.**  
Administrative Rulings, Conference Rulings, General Orders, Tariff Circulars, Rules of Practice, etc., will be found listed in Table of Cases in front of this volume.
- PUBLIC SERVICE COMPANIES.** See **COMMON CARRIERS; ELECTRIC, INCLINED PLANE, RAILROAD, STREET RAILWAY, TELEPHONE, TURNPIKE AND WATER COMPANIES.**  
Duties of—Failure to exercise franchises. *Brandt v. Leas*, 419; *Grubb v. Bangor Elec. L. H. & P. Co.*, 175.  
Publication of Commission's Rulings by. General Order No. 12, 339.  
Regulation of competition—Rights acquired prior to July 26, 1913. *Penna. Utilities Co. v. Lehigh Nav. Elec. Co.*, 422. See also **Approval (Municipal contracts).**  
Taxation—Exemption from local taxation—Property under lease. *Tracy, Receiver v. Harrisburg*, 367.
- RAILROADS.** See **APPROVAL, COMMON CARRIERS, ETC., ETC.**  
Duty to exercise charter powers. *Brandt v. Leas*, 419.  
Merger of continuous lines—Parallel and competing lines. *New York Central Merger*, 377.  
Rates—Reasonableness of—Comparison of—Discrimination between localities. *City of Phila. v. P. & R. Ry. Co.*, 313.  
Service of process upon—Jurisdiction. *Milleisen's Sons v. C. V. R. R. Co.*, 670.  
Through routes—Joint rates. *Lehigh Fire Brick Works v. P. R. R. Co.*, 625.
- RAILROAD COMMISSION.** Unfinished business of—Powers of Public Service Commission. *Penna. Paraffine Works v. P. R. R. Co.*, 513.
- RATES.** See **DISCRIMINATION, RETURN ON INVESTMENT, JOINT RATES, TARIFFS.**  
Adjustment between localities—Cement. *Dexter Portland Cement Co. v. L. V. R. R. Co.*, 447.  
Anthracite Coal—Reasonableness of—Comparison of—Discrimination between localities. *City of Phila. v. P. & R. Ry. Co.*, 313.  
Application of, at intermediate points. Conference Ruling No. 2, 101.  
Classification of traffic—Inclined plane companies. *Geer v. Cambria Inclined Plane Co.*, 455.  
Charging of rates other than those filed. *Mehard v. New Wilmington W. S. Co.*, 272.

- Commutation fares—Discrimination—Fair return on passenger traffic. Combined Committee, etc. v. P. R. R. Co., 390.
- Comparison of—Reasonableness—Evidence. Ernst v. Glenside Water Co., 119; Thompson & Hanna Co. v. Erie Co. Elec. Co., 199.
- Fair return on investment—Perpetual contract with borough prescribing rates. Borough of Mt. Union v. Mt. Union Water Co., 698.
- Fair return on investment. Baldrige v. McKeesport & Duquesne Bridge Co., 79.
- Fair return on investment—Valuation of property—Comparison of rates. Curry v. Emlenton Water Co., 613.
- Flat rate—Dispute as to amount of water consumed. Mansfield S. N. S. v. Mansfield Water Co., 522.
- Increase of—Reasonableness of—Burden of proof. W. Va. Pulp & Paper Co. v. P. R. R. Co., 673.
- Increase of, on one branch of service—Evidence. Elliott v. Big Spring Electric Co., 709.
- Minimum rate for electric service. Cauffiel v. Citizens' L. H. & P. Co., 189.
- Power of Commission to prescribe. Combined Committee, etc. v. P. R. R. Co., 717.
- Railroads—Suburban service. Jones v. D. L. & W. R. R. Co., 461.
- Special rate on coal hauled in producer's cars—Discrimination—Valuation of property. Penna. Rubber Co. v. P. R. R. Co., 31.
- Telephone companies—Joint exchange and toll service. Norwich Tel. Co. v. Bell Tel. Co., 466.
- Toll roads—Automobiles—Return on investment. Zook v. W. K. T. Road Co., 194.
- Unreasonable rates—Remedy. Borough of Avoca's Petition, 372.
- REASONABLENESS.** See **RATES, RULES.**
- RECEIVERS.** Action to recover on stock subscription contracts—Donaldson, Receiver v. Rabenhold, 145; Same v. Rollman, 155; Same v. Mabry, 159; Same v. Body, 162; Same v. Boyer, 165.
- Suit to recover funds misappropriated by treasurer. Schmitt, Receiver v. Potter, Title & Trust Co., 755.
- REFUND** of excess of class rate over commodity rate. Am. Reduction Co. v. B. & O. R. R. Co., 672.
- REGISTRATION.** See **FOREIGN CORPORATIONS.**
- RECORDING.** Articles of association. In re Co-operative Banking Associations, 340.
- REGULATION OF COMPETITION.** See **APPROVAL** (Municipal Contracts).
- Application of Harmony Elec. Co., 42.
- Unsatisfactory service—Remedy. Borough of Exeter's Petition, 52.
- REHEARING.** See **PRACTICE.**
- REPARATION.** Definition of. Adrian Furnace Co. v. P. R. R. Co., 632.
- Jurisdiction of Public Service Commission in cases unfinished by

- Railroad Commission. *Penna. Paraffine Works v. P. R. R. Co.*, 513.  
 On shipments moved prior to Jan. 1, 1914, 104.
- RETURN ON INVESTMENT. Reasonable rates. *Baldridge v. McKeesport & D. Bridge Co.*, 79.
- Investments in different localities—Difference in rates. *Borough of Lewistown v. Penn Central L. & P. Co.*, 249.
- Valuation of property—Comparison of rates. *Curry v. Emlenton Water Co.*, 613.
- What is a fair return. *Borough of Mt. Union v. Mt. Union Water Co.*, 698.
- Railroads—Freight and passenger traffic. Combined Committee, etc. *v. P. R. R. Co.*, 390.
- RULES. Governing the granting of power of attorney and issuing concurrences in tariffs. *Tariff Circular No. 1*, 91.
- Rules of Practice before the Public Service Commission, 1-31.
- RULES OF COMPANIES. Classification of patrons—Reasonableness of. *Meter v. Metropolitan Elec. Co.*, 117.
- Requiring payment in advance—Reasonableness of. *Cauffiel v. Citizen's L. H. & P. Co.*, 189.
- Scope of general demurrage rules. *Pittsburgh Plate Glass Co. v. P. R. R. Co.*, 530, 695.
- Water companies—Meters. *Lare v. Penna. Water Co.*, 733.
- RULINGS of Public Service Commission—Publication of. *General Order No. 12*, 339.
- SCHEDULES. Time schedules—Train service. *Hurst v. Erie R. R. Co.*, 453.
- SERVICE. See TRAIN AND TROLLEY SERVICE.
- Discrimination—Telephone companies. *Lehigh Valley Coal Co. v. Bell Tel. Co.*, 441.
- Failure to supply—Remedy. *Borough of Schuylkill Haven v. Schuylkill Haven G. & W. Co.*, 617.
- Inadequate and impure water supply. *Ernst v. Glenside Water Co.*, 119.
- Reasonable rules—Classification of service. *Meter v. Metropolitan Elec. Co.*, 117.
- Station facilities—Discrimination. *Blough v. B. & O. R. R. Co.*, 84.
- Unsatisfactory service—Remedy—Competition. *Borough of Avoca's Petition*, 372.
- Water supply—Improvements. *Mehard v. New Wilmington W. S. Co.*, 272.
- SERVICE AND FACILITIES AT STATIONS. At Wolfsburg, *Dallas v. P. R. R. Co.*, 180; at Kennard Station, *Callahan v. Erie R. R. Co.*, 257; at Woodside, *Keefer v. P. R. R. Co.*, 452, 539; at Coal-dale, *State Hospital v. E. Penna. Rys.*, 673; at New Market, *Davis v. N. C. Ry. Co.*, 605; at Espyville, *Rhoades v. Pennsylvania Co.*, 732; *Enck v. R. & C. R. R. Co.*, 528.

- SERVICE OF PROCESS.** Attachment—Foreign corporation—"Doing business." *Panarello v. Patterson, M. & L. Co.*, 238.  
 Corporations—Jurisdiction. *Schildt v. Valley Rys.*, 740.  
 Foreign corporations—Registration. *Locomobile Co. of A. v. Malone*, 439; *Woelpper v. Wilkes-Barre & Hazleton R. R.*, 761.  
 Insurance companies—Domicile. *Lamm v. Pension Mut. Life Ins. Co.*, 139.  
 Railroads—Jurisdiction. *Milleisen's Sons v. C. V. R. R. Co.*, 670.
- STATEMENT—SUFFICIENCY OF.** See **PLEADING.**
- STATIONS.** See **SERVICE AND FACILITIES AT STATIONS.**
- STATUTES.** Construction of—Constitutionality. *Milwaukee v. Western Malt Co. v. Mellet*, 357; *Com. v. Alden Coal Co.*, 656.
- STOCK.** Contract to purchase—Failure of consideration. *Donaldson, Receiver v. Mabry*, 159.  
 Redemption of preferred stock—Power of directors to close up business. *Wetherill v. Arasapha Mfg. Co.*, 579.  
 Subscription contracts—Affidavit of defense—Fraud. *Kramer, et al. Receivers v. Look*, 741.  
 Subscription contracts—Actions by receiver—Fraud—Failure to begin business—Affidavit of defense. *Donaldson, Receiver v. Rabenhold*, 145; *Same v. Rollman*, 155; *Same v. Mabry*, 159; *Same v. Body*, 162; *Same v. Boyer*, 165.
- STOCKHOLDERS.** Beneficial associations—Minority control—Forfeiture of membership. *Society of St. Michael, etc. v. Belinski*, 294.  
 Bill to restrain foreclosure of corporate mortgage. *Sickles v. Wyoming Valley Trust Co.*, 132.  
 Rights of—Favored stockholders. *Mamaux v. Union Casualty Ins. Co.*, 344.  
 Rights of—Merger—Laches—Dissolution—Distribution. *Com. v. Guardian Fire Ins. Co.*, 365.  
 Rights of majority and minority—By-laws—Quorum—Annual election. *Lutz v. Webster*, 349.  
 Rights of majority and minority—Bill to restrain change of name. *Hiester v. Gougliersville Band*, 298.  
 Right to sue for injury to corporation—Breach of contract. *White v. First Nat. Bank of Pittsburgh*, 748.  
 Wage claims against—Assignment of—Pleadings. *Blair, etc. v. Kingston Mfg. Co.*, 353, 355.
- STREETS.** Control of, by municipalities. *In re Use of Streets*, 127.
- STREET RAILWAY COMPANIES.** Extension of lines beyond termini named in charter—Power of Commission to compel. *Scranton v. Scranton Rys. Co.*, 689.  
 Extensions—Necessity for—Approval of. *Application of Reading B. & P. R. R. Co.*, 536.  
 Holding stock of another company—Engaging in another business. *In re Application of York Rys. Co.*, 540.

- Rates on interurban lines—Local conditions—Discrimination. *Sassaman v. Lehigh Valley Transit Co.*, 80.  
 Transfers—Discrimination. *27th Ward Prog. Club v. Pittsburgh Rys. Co.*, 585.
- SUBSCRIPTION CONTRACTS.** See **STOCK**.
- TARIFFS.** Deviation from—Discrimination. *Good Shepherd Home v. Lehigh Valley L. & P. Co.*, 187.  
 Effect of filing. *Crane R. R. Co. v. C. R. R. of N. J.*, 224.  
 In the matter of requiring published rates to continue in effect for 30 days. Administrative Ruling No. 5, 287; (Superseding Conference Ruling No. 1, 100).  
 Power of attorney—Issuing of concurrences. *Tariff Circular No. 1*, 91.  
 Rates on newly constructed lines. *Tariff Circular No. 2*, 98.
- TAXATION.** Anthracite Coal. *Com. v. St. Clair Coal Co.*, 654; *Com. v. Alden Coal Co.*, 656.  
 Capital stock—Exemption of manufacturing companies. See *Manufacturing Companies*.  
 Capital stock—Exemption by terms of special charter. *Com. v. Pottsville Water Co.*, 500.  
 Capital stock and corporate loans—Overpayment—Set-off—Re-settlement—Review of. *Com. v. Am. Lime & Stone Co.*, 503.  
 Corporate loans—Foreign corporations—"Doing business." *Com. v. The Tonopah & Goldfield R. R. Co.*, 128.  
 Holding companies. *Com. v. Wilkes-Barre & Hazleton R. R. Co.*, 543.  
 Double taxation—Constitutional law. *Com. v. Alden Coal Co.*, 656.  
 Gross premiums of insurance companies—Deduction of annual dividends and annuities. *Com. v. Metropolitan Life Ins. Co.*, 734; *Com. v. Penn Mutual Life Ins. Co.*, 559.  
 Public service companies—Exemption from local taxes—Leased property. *Tracy, Receiver v. Harrisburg*, 367.
- TELEPHONE COMPANIES.** Rates—Joint exchange and toll service. *Norwich Tel. Co. v. Bell Tel. Co.*, 466.  
 Rates—Service—Discrimination. *Lehigh Valley Coal Co. v. Bell Tel. Co.*, 441.
- THROUGH ROUTES.** Railroads. *Lehigh Fire Brick Works v. P. R. R. Co.*, 625.
- TRACKLESS TROLLEY.** Approval of. *Perkiomen Elec. T. Co.'s Petition*, 334.
- TRAIN AND TROLLEY SERVICE.** Between:  
*Allentown and Reading, Fiscus v. P. & R. Ry.*, 252; *Blossburg and Arnot, Hurst v. Erie R. R.*, 453; *Glenside and New Hope, Business Men's Assn. v. P. & R. Ry.*, 524; *Blossburg and Morris Run, Guy v. N. Y. C. R. R.*, 529; *Pine Grove and Outwood, Miners, etc. v. P. & R. Ry.*, 126.

- TRAIN SERVICE.** Agreement to operate a train "permanently." *Business Men's Assn. v. P. & R. Ry.*, 524.  
 Time schedules. *Hurst v. Erie R. R. Co.*, 453.
- TRANSFERS.** See **STREET RAILWAY COMPANIES.**
- TRANSPORTATION FREE.** See **PASSES.**
- TURNPIKE COMPANIES.** Maintenance of road-bed—Rates. *Zook v. W. K. T. Road Co.*, 194.
- USURY.** In re Co-operative Banking Associations, 340.
- VALUATION.** For rate making purposes—When necessary. *Penna. Rubber Co. v. P. R. R. Co.*, 31.  
 Reproduction cost—Depreciation—Abandoned property. *Curry v. Emlenton Water Co.*, 613.
- VIADUCT.** See **APPROVAL, APPORTIONMENT, CROSSINGS.**
- WAGE CLAIMS.** Against stockholders—Assignment of. *Blair, etc. v. Kingston Mfg. Co.*, 353, 355.  
 Insolvent corporation—Preference—Pending suit. *Jerymn v. Barium Product Co.*, 511.
- WATER COMPANIES.** Failure to provide adequate supply—Remedy.  
*Borough of Schuylkill Haven v. Schuylkill Haven G. & W. Co.*, 617.  
 Flat rate—Dispute as to amount consumed. *Mansfield S. N. S. v. Mansfield Water Co.*, 522.  
 Improvement of facilities. *Town Council, etc. v. Biglerville Water Co.*, 729.  
 Incorporation of—Territory. In re Incorporation of Water Co., 182.  
 Inadequate and impure supply. *Ernst v. Glenside Water Co.*, 119.  
 Inadequate service—Construction of municipal plant—Protest. *Borough of Gallitzin's Application*, 369.  
 Injunction to restrain erection of municipal plant—Competition. *Bondholders of Allegheny V. W. Co. v. Tarentum*, 518.  
 Ordinances—Validity—Jurisdiction of Public Service Commission—Installation of meters. *York Water Co. v. City of York*, 185.  
 Perpetual contract with borough prescribing rates—Inadequate service. *Borough of Mt. Union v. Mt. Union Water Co.*, 698.  
 Rules and regulations—Meters. *Lare v. Penna. Water Co.*, 733.  
 Service—Rates—Improvements. *Mehard v. New Wilmington W. S. Co.*, 272.









